March 19, 2021

First Supplement to Memorandum 2021-04

Death Penalty Panelist Biographies & Written Submissions

Memorandum 2021-04 gave an overview of the death penalty in California, the topic of the next meeting on March 25-26, 2021. This supplement presents biographies of the panelists scheduled to appear before the Committee on March 25-26, 2021, with links to some of the panelists' articles.

The Committee has also received written submissions from some other groups. Those submissions are attached to this memorandum, for the Committee to consider.

Panelist Biographies
Panel 1: History, Constitutional Issues, Innocence, & Costs

Professor Sean Kennedy is the Kaplan and Feldman Executive Director of the Center for Juvenile Law and Policy at Loyola Law School. Prior to this appointment, he was the Federal Public Defender for the Central District of California from 2006 to 2014 and previously served as Chief of the Federal Public Defender Capital Habeas Unit. Professor Kennedy taught Appellate Advocacy and the Death Penalty Law Seminar at Loyola Law School for many years. He also serves on the board of Loyola's Advocacy Institute. He has received honors including L.A. County Bar Association's Criminal Defense Attorney of the Year and Loyola's Fidler Institute Award for Defense Lawyer of the Year.

Professor Carol Steiker is the Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program at Harvard Law School. Her most recent publications address topics such as the relationship of criminal justice scholarship to law reform, the role of mercy in the institutions of criminal justice, and the likelihood of nationwide abolition of capital punishment. Her most recent book is *Courting Death: The Supreme Court and Capital Punishment* (with Jordan Steiker). Professor Steiker was president of the Harvard Law Review and clerked for Judge J. Skelly Wright of the D.C. Circuit Court of Appeals and Justice

Thurgood Marshall of the U.S. Supreme Court. For articles submitted to the Committee by Professors Carol and Jordan Steiker, click here.[1]

Professor Jordan Steiker joined the University of Texas Law School in 1990 after serving as a law clerk to Justice Thurgood Marshall of the U.S. Supreme Court. He teaches constitutional law, criminal law, and death penalty law, and is Director of the law school's Capital Punishment Center. He has written extensively on constitutional law, federal habeas corpus, and the death penalty. Some of his recent publications include *Courting Death: The Supreme Court and Capital Punishment* (with Carol Steiker); *The American Death Penalty and the (In)Visibility of Race* (with Carol Steiker); and *The Death Penalty from a Consequentialist Perspective*. For articles submitted to the Committee by Professors Carol and Jordan Steiker, click here.[2]

Panel 2: Racial & Geographic Bias

Professor Elisabeth Semel is Director of the Death Penalty Clinic and Clinical Professor of Law at Berkeley Law School. She represents clients facing capital punishment in California and other states, and has filed amicus curiae briefs in death penalty cases in the U.S. Supreme Court including *Miller-El v. Cockrell*, *Miller-El v. Dretke*, *Snyder v. Louisiana*, and *Williams v. California* (all dealing with race discrimination in jury selection). Some of Professor Semel's publications include *Batson and the Discriminatory Use of Peremptory Challenges in the 21st Century* and *Reflections on Justice Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*. For articles submitted to the Committee by Professor Semel, click here.[3]

Professor Emeritus Steven Shatz taught at the University of San Francisco from 1972 until his retirement in 2015. During that time, he was also a lecturer at Berkeley Law School, a visiting professor at Hastings College of Law, and a visiting professor at the East China Institute of Politics and Law. He created and directed the Keta Taylor Colby Death Penalty Project. Each summer, the project

[1] http://www.clrc.ca.gov/CRPC/Pub/Panelist_Materials/PM-20210325-Steiker.pdf
[2] http://www.clrc.ca.gov/CRPC/Pub/Panelist_Materials/PM-20210325-Steiker.pdf
[3] http://www.clrc.ca.gov/CRPC/Pub/Panelist_Materials/PM-20210325-Semel.pdf

trained law students in death penalty law and practice and sent them to the South to work as interns with capital defense attorneys. Professor Shatz is the co-author of casebooks on Criminal Law and Death Penalty Law, both now in their fourth editions, and he has written book chapters on the death penalty and numerous journal articles. He has also testified in court as an expert witness in three capital cases and consulted in many others.

Dr. Sherod Thaxton is Professor of Law at the UCLA School of Law. He is currently engaged in projects examining charging and plea-bargaining in both death penalty and non-death penalty contexts, state-level procedural sentencing law, and the behavioral underpinnings of substantive criminal law and sentencing law. His recent scholarship appears in the *Journal of Criminal Law & Criminology*, the *Journal of Criminal Justice*, the *European Journal of Criminology*, and the *Australian & New Zealand Journal of Criminology*. Prior to teaching, Dr. Thaxton was a staff attorney in the Capital Habeas Unit of the Office of the Federal Defender for the Eastern District of California and the principal investigator of the Death Penalty Tracking Project for the Office of the Multi-County Public Defender in Atlanta. For articles submitted to the Committee by Dr. Thaxton, click here.[4]

Dr. George Woods is a practicing physician, specializing in neuropsychiatry. He currently teaches Mental Health and the Law at Berkeley Law School, and also consults with legal teams dealing with complex criminal and civil litigation. He is currently a Senior Consultant to Crestwood Behavioral Health, Inc. and a member of the Governing Board of the Stanford University Medicare Shared Services Program, University Health Alliance Accountable Care Organization. Dr. Woods was appointed to the San Francisco District Attorney Post Conviction Unit Innocence Committee in August 2020. He is currently President-Elect of the International Academy of Law and Mental Health. He has won awards from the University of Utah Medical Center and the University of Milan.

[4] http://www.clrc.ca.gov/CRPC/Pub/Panelist_Materials/PM-20210325-Thaxton.pdf

The Committee is fortunate to have such a distinguished group of panelists. It will be interesting to hear what they have to say.

Respectfully submitted,

Rick Owen
Staff Attorney

Lara Hoffman
Fellow, Stanford Three Strikes Project

Written Submissions by Non-Panelists

Exhibit A
California District Attorneys Association,
The Truth About the Death Penalty

THE TRUTH ABOUT CALIFORNIA'S DEATH PENALTY SINCE 1977/1978.

"I know of no defendant facing execution who is innocent of the crime for which he was convicted and sentenced."

Attorney General Edmund G. Brown Jr.

(6/30/2008 in a letter to the California Commission on the Fair Administration of Justice when his office was actively litigating 583 capital cases and another four which had exhausted all of their appeals – letter attached)

NO ONE ON CALIFORNIA'S DEATH ROW HAS EVER BEEN EXONERATED AS FACTUALLY INNOCENT THROUGH DNA TESTING

(which is available at no cost to all capital defendants)

1. The current law governing capital cases for the last 40 years has NEVER instructed a jury that it MUST impose the death penalty as a sentence. Each juror sitting on a capital case ALWAYS has the option to vote to impose LIFE WITHOUT THE POSSIBILITY OF PAROLE instead of death. Each death sentence must be unanimous. All 12 jurors must agree. (1978 *Briggs* initiative passed by the California voters.)

2. THE SENTENCING JUDGE (THE TRIAL COURT) IS ALWAYS REQUIRED BY LAW TO PERFORM AN INDEPENDENT AND IMPARTIAL REVIEW OF THE EVIDENCE, acting as the 13th juror before sentencing. The sentencing judge ALWAYS has the authority to REDUCE the sentence from Death to Life Without the Possibility of Parole. (The sentencing judge can never increase the punishment.)

3. The California Supreme Court and the United States Supreme Court have repeatedly held that there is sufficient narrowing of the class of those eligible for special circumstances and the imposition of the death penalty, thereby making the California Penal Code as it relates to capital cases, constitutional.

4. A capital defendant has the right to present ANY mitigating evidence during the penalty phase which could justify life instead of death. The jury is also allowed to consider residual or lingering doubt about guilt in determining penalty.

5. Each Elected District Attorney in all 58 counties in California is vested with the discretion on whether to seek the death penalty for a given special circumstance murder. Elected District Attorneys only seek the death penalty in the most evil cases, truly reserved for the Worst of the Worst.

6. The California voters have REPEATEDLY DEFEATED ATTEMPTS TO ELIMINATE THE DEATH PENALTY and most recently passed a

ballot measure that would preserve the death penalty and correct some of the delays in the process.

7. A Capital Defendant is entitled to TWO FREE ATTORNEYS at all stages of the proceedings.

8. A Capital Defendant is entitled to petition the court for EXTENSIVE FREE FUNDS to pay for ANY TYPE of EXPERT at ANY stage of the proceedings.

9. Should a Capital Defendant be sentenced to death, the California Penal Code authorizes FREE DNA testing on appeal for a further review of the evidence.

10. After an Elected District Attorney makes the rare and considered decision to seek death, the case is assigned to a deputy district attorney and an investigator for preliminary hearing or grand jury indictment.

11. After the evidence is produced in this initial hearing and there is proof beyond a reasonable doubt to convince 12 jurors of the defendant's guilt in a capital murder and the appropriate sentence is death, then and only then does a capital prosecutor proceed to the trial court for a two part trial, guilt and sentencing.

12. Jurors are told by the court that there may be two parts to the trial, depending what happens in the guilt phase of the trial.

13. Should there be a second, sentencing phase of the trial, the same jury and alternates will hear evidence about sentencing issues. These two parts of this trial, typically involve 12 jurors and 4 alternates. (the number of alternates may vary)

14. Capital jurors are asked to make a great sacrifice of their time and their ability to serve their community during a long and serious trial and to be able to render a fair sentencing determination.

15. Capital jurors are told in advance that they MUST honestly be open to both possible sentences, otherwise they CANNOT serve. Death sentences are critically reviewed by multiple courts. Defendants are entitled to an automatic appeal of the death sentence. They may also apply for other post conviction relief in both state and federal courts.

16. The victim's family and friends are usually present for ALL stages of the proceedings. The pretrial motions, the pretrial hearing, the trial, sometimes they testify about the impact the crime has had on their family. They are present for the sentencing when the judge makes his/her independent review of the evidence.

17. Unfortunately, sometimes there are no victim's family present because the case was a cold case and solved through DNA decades later.

18. The law enforcement involved in the initial crime scene, solving the crime, who interact with the survivors are deeply touched by these most serious cases.

19. The victim advocates, who are guardian angels, are the glue that holds the family and friends together as a support system through all of this.

20. On 3/12/19 Governor Newsom declared a moratorium on executions in California as long as he was in office. On that day,

3/12/19, there were 737 inmates on DEATH ROW. The reason he declared a moratorium is because he had NO AUTHORITY to repeal the Death Penalty. ONLY the CALIFORNIA VOTERS HAVE THAT AUTHORITY and they have repeatedly voted to keep our law regarding capital punishment.

21. On 3/12/19 Governor Newsom OVERRULED the WILL OF THE CALIFORNIA VOTERS and many others in the criminal justice system and did so WITHOUT REVIEW OF A SINGLE CASE!

22. EVERY CALIFORNIAN should be honored to SERVE the victims of crime and yet there were 737 families whose voices were ignored on 3/12/19. Where is the justice in that?

23. The Elected District Attorneys who went through the painstaking process of choosing to seek death in those very rare cases special circumstance cases, they were abandoned on 3/12/19.

24. The line prosecutors and their investigators who dedicated their lives to seeking justice. Their service doesn't matter.

25. The attorneys general who made sure that the capital trials were fair to the defendant. Ignored.

26. The California Supreme Court who meticulously reviews EVERY death penalty case and reverses those that justice requires. Disregarded.

27. The habeas courts, both state and federal, that ONLY let stand those sentences that are JUST.

28. And after 3/12/19, Elected District Attorneys, but MORE importantly, CAPITAL JURIES have continued to return verdicts of DEATH in 5 ATROCIOUS SPECIAL CIRCUMSTANCE cases. These juries were instructed that they MUST ASSUME that the sentence of DEATH will be carried out. These juries were instructed that their vote on which sentence is appropriate for this crime must stand the test of time. Each of these jurors were told that they were PERSONALLY responsible for the sentencing verdict. And these jurors showed integrity and courage.

We must all continue to do justice for crime victims and their families as well as for those who commit murder.

Angela C. Backers
Co-Chair of the Capital Litigation Committee, CDAA
Senior Deputy District Attorney, Alameda County, (retired)

Exhibit B
California District Attorneys Association,
Statement of Commissioner Jerry Brown (2008)

SEPARATE STATEMENT OF COMMISSIONER BROWN

June 30, 2008

John Van de Kamp, Chairman
Commissioners
California Commission on the
Fair Administration of Justice

Dear Chairman Van de Kamp and
Commission Members:

I appreciate the hard work that went into this report. There are many issues involved in the application of the death penalty in California and I know commission members strove to achieve consensus on meaningful reforms. Regretfully, this goal still eludes us.

Capital litigation constitutes a substantial portion of my office's workload. Our lawyers work every day to defend death penalty judgments consistent with fairness, due process and constitutional requirements. Currently, we are handling some 343 capital cases at various stages of direct appeal to the California Supreme Court, 103 capital cases on habeas corpus in the state courts, 121 capital cases on habeas corpus in the federal district courts, and 16 capital cases in the United States Court of Appeals for the Ninth Circuit. Four condemned inmates have exhausted all challenges to their judgments and await the setting of their execution dates once the status of California's lethal-injection protocol is resolved by the state and federal courts. I know of no defendant facing execution who is innocent of the crime for which he was convicted and sentenced.

I share the Commission's concerns about the high costs associated with capital litigation and about the difficulty in finding and appointing qualified counsel to represent defendants in these cases. I am also concerned about needless delay in reviewing capital judgments, which has a number of causes. While death penalty proceedings warrant exceptionally careful review and cannot be rushed, multiple rounds of repetitive litigation can cause unnecessary delay, increase costs, and undermine respect for the criminal justice system.

I agree with the Commission that consideration should be given to seeking a constitutional amendment to permit transferring some death-penalty appeals from the California Supreme Court to the courts of appeal. I also agree that consideration should be given to seeking authorization to allow initiating state capital habeas corpus cases in the trial court, with appellate review in the courts of appeal. I believe that we should promptly begin to work on these proposals, even though their specific features need to be worked out.

I ask that this letter be included with the Commission's report.

Sincerely,

Edmund G. Brown Jr.
Attorney General

Exhibit C
Prosecutors Alliance California,
Letter to Committee

PROSECUTORS ALLIANCE California

March 18, 2021

Committee on the Revision of the Penal Code
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, California 95616
Via email to: rowen@clrc.ca.gov

RE: California's Death Penalty Should be Repealed

Dear Committee Members,

On behalf of the Prosecutors Alliance of California, I appreciate the opportunity to contribute to the Committee's discussion of California's death penalty. We believe the death penalty is deeply flawed, undermining both public safety as well as the moral authority of our justice system, and should be abolished.

The Prosecutors Alliance of California is a nonprofit organization of prosecutors committed to reforming California's criminal justice system through smart, safe, and modern solutions that advance not just public safety, but also human dignity and community well-being. Founded by the elected district attorneys of Los Angeles, San Francisco, Contra Costa, and San Joaquin counties, PAC's prosecutors represent one-third of all Californians.

We know that the family members of murder victims in capital cases have endured unspeakable suffering and live every day with the pain of losing their loved ones in a violent manner. We honor their loss and strive to find ways to help them heal and seek justice. We believe the death penalty does not serve those goals. Indeed, we agree with former San Diego District Attorney Bonnie Dumanis who concluded that California's death penalty is a "hollow promise" that does not serve victims.

Research shows — and the vast majority of law enforcement professionals agree — that capital punishment does not prevent violent crime.[1] It is exorbitantly expensive, draining taxpayer dollars that could be better used supporting crime survivors and improving the quality of life and safety for all of our communities.

California's death penalty is also rooted in racism and remains discriminatory in its application: Study after study has shown that California's death penalty is applied disproportionately against Black and Latino people, particularly if the victim is

[1] National Research Council (2012) *Deterrence and the Death Penalty*. Committee on Deterrence and the Death Penalty, Daniel S. Nagin and John V. Pepper, Eds. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press; Radelet ML and TL Lacock, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489 (2008-2009).

white.[2] This racism is pervasive, emanating from the policing system, jury selection process, access to effective counsel, and, of particular concern to our members, prosecutors' broad discretion in deciding whether to seek life or death.

Finally, as explained in the amicus brief we filed in the case of *People v, McDaniels*, which we are providing to the Committee, we believe California's death penalty fails to effectively narrow the class of individuals eligible for death, resulting in arbitrary application.

For more than 40 years, California has been tinkering with the death penalty in the hopes of making it more effective and more just. These efforts have utterly failed. The death penalty continues to serve no public safety purpose, has wasted billions of dollars of taxpayer resources, is racially discriminatory, and is inconsistent with the values of a humane society. The death penalty in California cannot be fixed; it must be repealed.

Thank you for the opportunity to weigh in on a matter of such high importance.

Respectfully,

Cristine Soto DeBerry
Executive Director

[2] *See*, e.g., Grosso, CM et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394, 1406 (2019); Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides*, 1990-1999, 46 Santa Clara L.Rev. 1, 19-20 (2005).

Exhibit D
Prosecutors Alliance California,
Amicus Brief: People v. Donte McDaniel

No. S171393 (Capital Case)
(Los Angeles County Superior Court No. TA074274)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

DON'TE LAMONT MCDANIEL,
Defendant and Appellant.

APPLICATION OF SIX PRESENT OR FORMER DISTRICT ATTORNEYS (DIANA BECTON, CHESA BOUDIN, GIL GARCETTI, GEORGE GASCÓN, JEFFREY ROSEN, AND TORI VERBER SALAZAR) TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT AND BRIEF AMICI CURIAE

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Pursuant to California Rule of Court 8.520(f), amici Diana Becton, Chesa Boudin, Gil Garcetti, George Gascón, Jeffrey Rosen, and Tori Verber Salazar hereby respectfully apply to this Court for leave to file the accompanying Brief Amici Curiae in Support of Appellant in the above-captioned case.[1]

Each of the amici has a strong interest in the issues before this Court. As current and former district attorneys, each amicus has experience proving cases beyond a reasonable doubt and persuading a jury to unanimously convict. They believe these are the appropriate standards to apply in the penalty phase in a capital case, where the issue is one of life or death.

Diana Becton. Amicus Diana Becton served for 22 years as a judge in Contra Costa County, where she was elected as Presiding Judge. She also served as an appellate judge, both for the Contra Costa Superior Court, and as a judge pro tem for the Court of Appeal, First Appellate District. On September 17, 2017, she was sworn in as the 25th District Attorney for the County of Contra Costa. In June 2018, she was elected to a full term in office. She is the Immediate Past President of the National Association of Women Judges, the nation's leading voice for women in the judiciary. She has

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[1]No party or counsel for any party authored any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. CAL. R. CT. 8.520(f)(4).

served as the Chair of the California State Bar Council on Access and Fairness. She earned a J.D. from Golden Gate University School of Law and a Masters Degree in Theological Studies from the Pacific School of Religion.

Earlier this year, District Attorney Becton supported the decision by six district attorneys to refrain from seeking the death penalty for Joseph James DeAngelo Jr., who pleaded guilty to 13 murders and 13 charges of kidnapping for purposes of robbery over a 13 year period, including some crimes from Contra Costa County. DeAngelo also admitted to 161 uncharged crimes of rape, attempted murder, robbery, burglary and kidnapping, crimes that involved 61 victims. Her office currently has several capital eligible cases that it is reviewing. District Attorney Becton is deeply concerned about the arbitrary application of capital punishment in California and the racial disparities that continue to exist with regards to the race of the jury, the race of the defendant, and the race of the victims.

Chesa Boudin. Amicus Chesa Boudin was elected to the position of San Francisco District Attorney in November 2019. He was a Rhodes Scholar and graduated from Yale Law School. He worked as a law clerk to the Honorable M. Margaret McKeown on the United States Court of Appeals for the Ninth Circuit and later for the Honorable Charles Breyer on the United States District Court for the Northern District of California. He then worked as a public defender in San Francisco, where he helped lead the office's bail reform unit.

District Attorney Boudin understands the impact of incarceration on a deeply personal level. Both of his parents were incarcerated throughout his childhood, and his father is still in prison. He has publicly stated that he will not seek the death penalty as the San Francisco District Attorney. He agrees with the increasing number of Californians who have come to recognize that the death penalty is not only undeniably cruel and inconsistent with the values of a human society, but also fails to deter or prevent crime.

Gil Garcetti. Amicus Gil Garcetti spent a total of 32 years in the Los Angeles District Attorney's Office, serving as a trial prosecutor, manager, and chief deputy district attorney, before being elected District Attorney for the County of Los Angeles in 1992. As District Attorney, Mr. Garcetti focused on addressing domestic violence, hate crimes, and street gangs. Following his tenure as District Attorney, Mr. Garcetti was appointed to the Los Angeles City Ethics Commission and served as a fellow at the Institute of Politics at the John F. Kennedy School of Government at Harvard University.

During his tenure as District Attorney, the office continued to pursue the death penalty. After leaving office, Mr. Garcetti concluded that the death penalty in California is dysfunctional and applied in an unfair manner. He has publicly called for repeal of the death penalty, and has campaigned for ballot initiatives that would have repealed the death penalty in California.

George Gascón. Amicus George Gascón is the former District Attorney of the City and County of San Francisco. He

started his career in 1978 as a police officer with the Los Angeles Police Department. Over the years, he worked his way up from patrol officer to Assistant Chief of Police, while earning a law degree from Western State College of Law in 1996. In 2006, he was appointed Chief of the Mesa Police Department in Arizona. In 2009, then-Mayor Gavin Newsom appointed Gascón to be San Francisco's Chief of Police. In 2011, when then-District Attorney Kamala Harris vacated her seat after being elected California's Attorney General, Newsom appointed Gascón to be San Francisco's District Attorney. He served in that role until 2019, winning re-election twice. He is currently a candidate for District Attorney of the County of Los Angeles.

While he began his career as a supporter of the death penalty, Mr. Gascón's views on the death penalty have evolved over his lengthy career in law enforcement. As a result of his experience, he came to believe that the death penalty does not make communities safer. Instead, he found that it drained limited public safety resources that could be better used on programs that actually improve the quality of life and promote safety for everyone. He also became deeply troubled by the arbitrary way capital punishment was applied in California, and its disproportionate impact on communities of color and poor people. Mr. Gascón did not seek the death penalty during his tenure as the San Francisco District Attorney.

Jeffrey Rosen. Amicus Jeffrey Rosen is the elected District Attorney of Santa Clara County. He joined the district attorney's Office as a junior prosecutor in 1995, after working

at several private law firms. He was elected district attorney in the fall of 2010. As district attorney, he established a Cold Case Unit using the most advanced DNA technology to investigate unsolved murders and bring justice to long suffering families. He also created a Conviction Integrity Unit to investigate innocence claims and implement the most professional and ethical practices in criminal prosecution, including: double blind eyewitness identification; Open File Discovery; a Brady Committee to investigate police officer misconduct; a collateral consequences policy to prevent undocumented individuals from deportation for non-violent, low-level offenses; a Body Worn Camera policy to increase confidence in policing; and a model protocol for the independent, objective, and transparent investigation of police officer-involved shootings.

In 2018, District Attorney Rosen traveled to Montgomery, Alabama with an interfaith group to visit The Legacy Museum, which tells the history of the United States from slavery to mass incarceration, and the National Memorial for Peace and Justice, which documents the lynching of thousands of African-Americans in the 19th and 20th centuries. He was so moved by what he experienced in Montgomery that the following year, he took his wife and daughters to The Legacy Museum and the National Memorial for Peace and Justice. These trips, along with the death of George Floyd beneath a police officer's boot, underlined the racism and arbitrariness associated with the killing of African-

Americans, and led to District Attorney Rosen's decision to no longer seek the death penalty.

Tori Verber Salazar. Amicus Tori Verber Salazar comes from a long line of family members in law enforcement. She rose through the ranks of the San Joaquin District Attorney's Office prosecuting gang-related homicides and became the first woman elected District Attorney in 2015. Over the course of her career, she realized the death penalty does not create a safer community and puts victim's families through years of turmoil. Furthermore, it exhausts already limited economic resources restricting the ability to prosecute current cases and put those resources into prevention. As District Attorney, her focus is to ensure public safety, including expanding Victim-Witness services, and establishing the first Family Justice Center in the County. She has addressed racial disparities by instituting sweeping reforms and innovations and has worked to restore trust in her community. She has worked with Stanford Law School challenging how officer involved fatalities are investigated and prosecuted in the State of California.

District Attorney Verber Salazar is committed to righting racial inequalities and has implemented restorative justice programs. These values guide her charging decisions, including her choice not to seek the death penalty during her tenure in office.

The attached amici curiae brief addresses one of the two questions posed by this Court in its June 17, 2020 order for supplemental briefing: "Do Penal Code section 1042 and article I,

section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict?" The attached brief shares amici's perspective as present and former elected District Attorneys who believe that the death penalty is arbitrarily imposed, and to explain why, in their view, this question should be answered in the affirmative.

Amici are familiar with the briefs that have been previously filed in this case. Amici believe their experience as former and present district attorneys, as reflected in the attached brief, will be of assistance to this Court in deciding the important issue raised. Amici therefore respectfully request leave to file the attached brief amici curiae in support of Appellant.

DATED: October 26, 2020

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ *Steven L. Mayer*
STEVEN L. MAYER

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NATASHA MINSKER

By: /s/ *Natasha Minsker*
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By: /s/ *Jeffrey F. Rosen*
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TORI VERBER SALAZAR

By: /s/ *Tori Verber Salazar*
TORI VERBER SALAZAR

In Propria Persona

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REID HASTIE ET AL., INSIDE THE JURY (1983) 46, 47

Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 ARK. L. REV. 267 (2017) 40, 41

Garth A. Osterman & Colleen Wilcox Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F. L. REV. 1249 (1996) 26

Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005) 33

Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,* 40 U. MICH. J.L. REFORM 569 (2007) 47

Steven F. Shatz, Glenn L. Pierce, & Michael Radelet, *Race, Ethnicity and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion*, 51 COLUM. HUMAN RIGHTS L. REV. 1070 (2020) 26, 28, 29, 31

Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 BERKELEY J. GENDER, L. & JUST. 64 (2012) 27, 28

Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283 (1997) 27

John Simerman, *Split Verdict in Cardell Hayes' Trial Shines Light on How Louisiana's Unusual Law Affects Jury Deliberations*, NEW ORLEANS ADVOC. (May 1, 2018) 46

INTRODUCTION

On June 17, 2020, the Court asked the parties to address the following question: "Do Penal Code section 1042 and article I, section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict?" This brief addresses that question from the perspective of four present district attorneys and two former district attorneys. While these amici take different positions as to whether the death penalty should be abolished, they unanimously believe that death sentences are arbitrarily imposed under the current California death penalty statutes, and that the failure to construe the California Constitution and Penal Code Section 1042 to require the jury to choose death beyond a reasonable doubt and to unanimously find disputed facts relating to aggravating circumstances exacerbates the arbitrariness inherent in the State's death penalty regime.

This brief presents the following argument. *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny require the State to adopt a non-arbitrary means of distinguishing the few convicted murderers sentenced to die from the many murderers who receive lesser sentences. Neither California's list of the "special circumstances" that make murderers eligible for the death penalty nor its penalty phase list of "aggravating factors" fulfills that function. As a result, the selection of defendants that receive the death penalty is influenced both by irrelevant factors, such as geography and

whether the defendant is represented by a public defender or a court-appointed lawyer, and impermissible factors, such as the race and ethnicity of the defendant and the victim. Given that context, the best way to reduce the arbitrariness inherent in California's death penalty scheme, and ensure that the death sentence is chosen (if at all) for only the worst offenders and offenses, is to require that the penalty jury's decision to impose the death sentence be made beyond a reasonable doubt and that the jury's findings as to the facts giving rise to aggravating circumstances be made unanimously. In a nutshell, failure to provide these *procedural* requirements amplifies the arbitrary application of the death penalty in California caused by the State's failure to impose adequate *substantive* limits on who receives the death penalty.

ARGUMENT

I.

CALIFORNIA'S CURRENT DEATH PENALTY REGIME LEADS TO THE ARBITRARY IMPOSITION OF THE DEATH SENTENCE.

A. *Furman* And Its Progeny Require The State To Adopt Legislative Safeguards Against The Arbitrary Imposition Of The Death Penalty.

The Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion); *accord Zant v. Stephens*, 462 U.S. 862, 874 (1983). Thus, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant,* 462 U.S. at 877). In other words, because death "is an extreme sanction, suitable [if at all] to the most extreme of crimes" (*Gregg*, 428 U.S. at 187 (plurality opinion)), the State must provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

This narrowing function must be done in the first instance by state legislatures through the enactment of statutory aggravating circumstances (or "special circumstances," as they are called in California). *See Zant*, 462 U.S. at 878 ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"). But the requirement that the death penalty not be arbitrarily imposed applies to other phases of the death penalty process, as well. For example, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court reversed a death sentence based on a state supreme court finding that the offense was "outrageously or wantonly vile, horrible and

inhuman," because a "person of ordinary sensibility could fairly characterize almost every murder" in those terms. *Id.* at 428–29. Likewise, the Court has held that "meaningful judicial review" of death sentences is "another safeguard that improves the reliability of the sentencing process." *California v. Brown*, 479 U.S. 538, 543 (1987). In short, "[t]he Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *Id.* at 541.

B. The California Death Penalty Statute, As Currently Administered, Does Not Perform The Narrowing Function Mandated By *Furman* And Its Progeny.

1. The Special Circumstances Listed In Penal Code Section 190.3 Were Intended To, And Do, Apply To Almost Every First Degree Murder.

According to its author, State Senator John V. Briggs, the death penalty initiative enacted in 1978 was intended to "give Californians the toughest death-penalty law in the country." California Journal Ballot Proposition Analysis, CALIF. J., Nov. 1978, Special Section, at 5. Accordingly, the voters were told, in the ballot argument in favor of the measure, that the initiative would make the death penalty applicable to *all* murders: "[I]f you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death

penalty law does not apply to every murderer. Proposition 7 would." State of California, Voter's Pamphlet, at 34 (1978).

The Briggs Initiative thus amended Penal Code 190.2 to list 26 different "special circumstances" that would qualify a murder for the death penalty. *See* PENAL CODE §190.2 (1978).[2] And the present version of the same statute lists 32 special circumstances. PENAL CODE §190.2.[3]

Moreover, several of these special circumstances are quite broad. For example, California makes simple felony murder a special circumstance. Thus, any person who kills "in the commission of, or attempted commission of, or the immediate flight after committing, or attempting to commit" any of 12 listed felonies is automatically death-eligible, irrespective of the defendant's mental state. *See* PENAL CODE §190.2(a)(17), (b).[4] California also makes "lying in wait" a

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[2] These special circumstances were enumerated in 19 code subdivisions, one of which (felony murder) had nine subdivisions. PENAL CODE §190.2(a)(1)–(19)(1978). However, this Court held that Section 190.2(a)(14) was unconstitutional in *People v. Superior Court (Engert)*, 31 Cal. 3d 797, 806 (1982).

[3] The special circumstances are now enumerated in 22 code sections, one of which, Section 17, contains 12 subsections, each defining an independent basis for death eligibility. *See* PENAL CODE §190.2(a)(17)(A)–(L).

[4] Although the felony murder language of Penal Code Section 189 is not identical to the special circumstances language (referring to "perpetration" rather than "commission" and omitting any refer- ence to "flight"), both are "equally broad." *People v. Hayes*, 52 Cal. 3d 577, 631–32 (1990) (felony murder and felony murder special circumstance both apply if the killing and the felony "are parts of one continuous transaction").

special circumstance (*id.* §190.2(a)(15)), which makes most premeditated murders eligible for the death penalty. [5]

Numerous empirical studies, covering different time periods and using different methodologies and data sets, have concluded that California's special circumstance statute does what it was intended to do: make almost every first degree murder eligible for the death penalty. One study, published just this year, of murders committed in San Diego between 1978 and 1993 found that 81% of those convicted of first degree murder were factually death-eligible under Section 190.2. Steven F. Shatz, Glenn L. Pierce, & Michael Radelet, *Race, Ethnicity and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion*, 51 COLUM. HUMAN RIGHTS L. REV. 1070, 1086 (2020) ("*Race and Ethnicity*"). Another study published last year analyzed statewide convictions between 1978 and 2002, and found that the special circumstances listed in 2008 applied to 95% of cases that resulted in a conviction for first degree murder, 38% of convictions for second-degree murder, and 47% of convictions for voluntary manslaughter. David Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. EMPIRICAL

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[5] *See generally* Garth A. Osterman & Colleen Wilcox Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F. L. REV. 1249 (1996) (reviewing development and expansive application of lying in wait special circumstance). "[T)he lying in wait definition 'has been expanded to the point [that] it is in great danger of becoming a "general circumstance" rather than a "special circumstance," one which is present in most premeditated murders not just a narrow category of those killings.'" *Id.* at 1279 (citation omitted).

LEGAL STUD. 693, 714 (2019) ("*Furman at 45*"). A comprehensive study of all first degree murder convictions between 2003 and 2005 found a death eligibility rate of 84.6%. *See* Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty*, 27 BERKELEY J. GENDER, L. & JUST. 64, 93 (2012) ("*Chivalry*"). And a study of first degree murder convictions decided on appeal between 1988 and 1992 showed that special circumstances applied in more than 84% of the cases. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1338–43 (1997). In short, as Professor Gerald Uelmen has stated, "[t]here is nothing 'special' about the special circumstances in California's death penalty law; they have been deliberately designed to encompass nearly all first degree murders." Declaration of Gerald F. Uelmen, at 7, submitted as Exhibit 33 in *Ashmus v. Wong*, No. 3:93-cv-00594-TEH (N.D. Cal. Feb. 17, 1993).

Amici recognize that this Court has held that the special circumstances enacted through the Briggs Initiative "perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." *People v. Bacigalupo*, 6 Cal. 4th 457, 468 (1993). They do not ask the Court to revisit that holding. But, as a matter of empirical fact, the studies cited above, several of which are quite recent, demonstrate that the overwhelming majority of defendants convicted of first degree murder are potentially

death eligible, even before the most recent amendments to the definition of first degree felony murder. Consequently, the decrease in arbitrariness that *Furman* and its progeny require must occur at some other stage of the death penalty process.[6]

2. Given The Large Pool Of Death-Eligible Defendants, The Selection Of Those Sentenced To Death Is The Result Of Numerous Factors, Some Permissible, Some Arbitrary, And Some Impermissible.

Although the breadth of Section 190.2 makes most first degree murders eligible for the death penalty, juries elect a death sentence in relatively few cases. For example, the statewide study published in 2019 found that a death sentence was imposed in only 4.3% of death-eligible cases. *Furman at 45, supra*, at 693. The San Diego study published this year found a death sentence rate of 4.7%. *Race and Ethnicity, supra,* at 1085–86. The study of all first degree murder convictions between 2003 and 2005 found a death sentence rate of 5.5%. *Chivalry*, *supra*, at 93. How, then, does the large pool of death-eligible defendants get winnowed down to the relatively few defendants for whom the jury chooses the death penalty?

The logical place to start is prosecutorial discretion. "Prosecutors enjoy complete discretion over whether to charge

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[6] Amici recognize that *People v. Vieira*, 35 Cal. 4th 264 (2005), rejected a claim that California's special circumstances were impermissibly broad, based on the 1997 study of published murder conviction appeals between 1988 and 1992. *Id.* at 303–04. But amici do not claim that the statute is invalid for this reason and, in addition, rely on three additional studies that postdate, and confirm, the study rejected in *Vieira*.

a special circumstance and, if so, whether to seek the death penalty." *Race and Ethnicity, supra,* at 1078. Indeed, this discretion is exercised at multiple points in the death penalty process.

First, given the breadth of the special circumstances statute, prosecutors have broad discretion in deciding whether to charge special circumstances. The statewide study of all convictions between 1978 and 2002 found that special circumstances were charged in 28% of the cases where the defendant was death eligible. *Furman at 45*, *supra,* at 724. The San Diego study found that prosecutors charged special circumstances in 27.6% of such cases. *Race and Ethnicity, supra,* at 1085.

Second, even when special circumstances are alleged, the prosecutor can waive the allegation once alleged, either unilaterally or as part of a plea bargain. According to the statewide study of convictions between 1978 and 1993, this happens in 20% of the cases in which special circumstances have been alleged. *Furman at 45*, *supra,* at 725.

Third, even after a jury finds one or more special circumstances, the prosecutor has discretion to waive the penalty trial and accept a sentence of life without the possibility of parole. *Id; see id.* at 726 ("prosecutors often do not seek a death sentence after a special circumstance has been found in the guilt trial and proceed solely to an LWOP sentence").

As present and former elected district attorneys, amici believe that prosecutorial discretion is a feature, not a bug, of

the current death penalty system. After all, district attorneys are independently-elected constitutional officers of the counties in which they serve, and are therefore politically accountable to their constituents. CAL. CONST. art. XI, §1(b). If San Francisco wants to elect district attorneys who will not seek the death penalty as a matter of principle, nothing prevents the people and their elected district attorneys from making those choices. And if the citizens of other counties want to elect district attorneys who take a different position on the death penalty, that, too, is their prerogative.

Having said that, however, amici candidly concede that prosecutorial discretion is not a complete answer to the question of how the death penalty can be constitutionally applied to winnow the few defendants who are subject to the death penalty from the overwhelming majority who are not. To begin with, because of the breadth of Section 190.2, that statute by itself cannot serve as a guide for the exercise of prosecutorial discretion. *See* Part I(B)(1), *supra*. Accordingly, the exercise of that discretion is not bound by any legal constraints set forth in the death penalty statute, and therefore cannot possibly comply with the constitutional requirement that the state adopt death penalty standards that prevent the death penalty from being imposed arbitrarily. *See* Part I(A), *supra*. Moreover, it is not clear that charging decisions do, in fact, correspond to the gravity of the offense. For example, there are many murders where the facts seem particularly egregious that are not charged as special

circumstances. Thus, the San Diego study found that almost two-thirds of the defendants with multiple special circumstances or who killed two or more victims were not charged with death. *Race and Ethnicity, supra,* at 1096.

This raises the disturbing possibility that these decisions are influenced by racial and ethnic discrimination. While the law is clear that "prosecutorial discretion cannot be exercised on the basis of race" (*McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987)), the data suggests that, unfortunately, these decisions are influenced, consciously or unconsciously, by race. For example, the San Diego study found that "[i]n cases with white victims and minority defendants, the odds the District Attorney would seek death were over seven times as high in [white victim/Latinx defendant] cases and six and a half times as high in [white victim/black defendant] cases as in cases with black or Latinx victims." *Race and Ethnicity*, *supra,* at 1095. Similarly, previous studies, in both California and other states, have found "consistent evidence of a greater probability of death sentencing and charging in cases with white victims." Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L. REV. 1394, 1439 (2019); *see id.* at 1412 nn. 84-85. Likewise, the statewide study of homicides between 1978 and 2002 found that "individual special circumstances apply to defendants disparately by race and ethnicity, even after controlling for case culpability, victim race, and year." *Id.* at 1441. In short,

unfettered and unreviewable prosecutorial discretion can raise as many questions as it answers.

Even apart from race, there are significant indicators that prosecutorial discretion is being used to impede, rather than advance, the winnowing process. For example, Riverside County has become one of the nation's leading producer of death sentences. In 2015, with eight new death sentences, Riverside sent more people to death row than every other state in the country except Florida and California itself. *See* Death Penalty Info. Ctr., *The Death Penalty in 2015: Year End Report*, at 3, https://files.deathpenaltyinfo.org/reports/year-end/2015YrEnd.f1560295944.pdf (last visited Oct. 21, 2020). Between 2010 and 2015, Riverside amassed 29 death sentences (not including re-sentences), the second most of any county in America. Fair Punishment Project, *Too Broken to Fix: Part I*, at 31 (Aug. 2016). Riverside's rate of death sentencing per 100 homicides was nearly nine times the rate for the rest of California (other than Kern, Los Angeles, Riverside, Orange and San Bernardino counties). *Id.* at 31 & n.280. Likewise, Orange County's rate of death sentences per homicide is the second-highest in the State, second only to Riverside County. Fair Punishment Project, *Too Broken to Fix: Part II*, at 39 (Sept. 2016). In other words, whether a defendant faces the death penalty is due in part to where the murder occurred, an irrational factor that has nothing to do

with either the culpability of the defendant or the seriousness of the offense.[7]

Moreover, whether a defendant faces the death sentence is also greatly influenced by the quality of the lawyer opposing the prosecutor: the defendant's counsel. More than 25 years ago, law professor Stephen Bright wrote that the death penalty in America was handed down not "for the worst crime, but for the worst lawyer." *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994). And the importance of a quality defense is vividly illustrated by the disparate outcomes between cases handled by public defenders compared to those handled by private, court-appointed counsel. There is no reason to believe that defendants represented by private, court-appointed counsel are more culpable, or commit graver offenses, than defendants represented by public defenders. Yet the former group is over-represented on death row. For example, the Los Angeles County Public Defender's Office handles roughly half of the trial stage death penalty cases in the county, and the Alternate Public Defender takes an additional 20% that the Public Defender's Office cannot. *Too Broken to Fix II*, *supra*,

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[7] Here, too, race matters. "[D]eath sentencing in California is highest in counties with a low population density and a high proportion of non-Hispanic white residents. The more white and more sparsely populated the county, the higher the death sentencing rate." Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 31 (2005).

at 30. Nevertheless, between 2010 and 2015, only one defendant represented by the Public Defender's office and three represented by the Alternate Public Defender's office were sentenced to death, in contrast to 26 represented by appointed private counsel. *Id.* Likewise, of the eight people sentenced to death in Riverside County in 2015, only one was represented by the public defender's office, whereas the other seven were represented by court appointed private lawyers. *Too Broken to Fix I*, *supra*, at 33.[8]

In summary, then, whether a defendant is subject to the death sentence is the result of a host of factors. Some are plainly permissible, such as the prosecutor's evaluation of the seriousness of the offense and the defendant's history. Some are arbitrary and have no relationship to these concededly legitimate factors, such as where the murder was committed and whether the defendant was represented by a public defender or private, court-appointed counsel. And, sadly, some of the factors that influence whether the defendant receives a death sentence are not only irrelevant but con-

[8] These disparate results may be due, in part, to the amount of mitigating evidence presented by defense counsel. In Los Angeles, for example, the single case handled by the public defender where a death sentence was handed down had a mitigation presentation that lasted seven days. *Too Broken to Fix II*, *supra,* at 30. "For the private bar attorneys, the average presentation was 2.4 days." *Id.* Likewise, half of the Riverside County death sentences reviewed on direct appeal between 2006 and 2015 involved the equivalent of one full day's worth or less of mitigation evidence, and two-thirds of the cases involved two days or less. *Too Broken to Fix I*, *supra*, at 33–34. "On average, only seven hours of mitigation evidence was presented during trial, and 12 percent of cases—approximately one out of every 10—had zero hours of mitigation presented." *Id.* at 34.

stitutionally impermissible, such as the race or ethnicity of the defendant and the victim.

Given these variables, there is no basis for assuming that the defendants who advance to the penalty phase of a capital case have been selected solely on the basis of the legitimate factors recognized in the Penal Code. At bottom, then, it is the jury that must decide which of these heterogeneous defendants shall live and which shall die. It is against this backdrop that we turn to the principal question posed by the Court, and demonstrate that the failure to require jury unanimity and application of the beyond a reasonable doubt standard at the penalty phase amplifies the arbitrariness at this critical stage of the death penalty process.

II.

THE ABSENCE OF PROCEDURAL REQUIREMENTS SUCH AS A HEIGHTENED BURDEN OF PROOF AND JURY UNANIMITY AMPLIFY ARBITRARINESS, FURTHER VIOLATING THE CONSTITUTIONAL COMMAND THAT THE DEATH PENALTY BE RESERVED FOR THE WORST OFFENSES.

Penal Code Section 190.3 provides that, after hearing evidence presented by both parties during the penalty phase of a capital trial, the jury "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." But under current law the jury need not decide that the death penalty is warranted beyond a reasonable doubt. Some jurors might believe that death is warranted to a moral certainty. Other jurors might have doubts about whether the defendant

deserves to die but find that the balance nevertheless tips slightly in favor of death. And some jurors might fall between these extremes.

Similarly, under current law there is no requirement that the jury unanimously agree on the aggravating factors that serve as a basis for finding that the defendant deserves death. Some jurors might believe that the death penalty is warranted because of the "circumstances of the crime of which the defendant was convicted . . . and the existence of any special circumstance found to be true" in the criminal proceeding. PENAL CODE §190.3(a). Accordingly, these jurors might not need to decide whether the defendant had engaged in other "criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." *Id.* §190.3(b). Conversely, other jurors might believe that the crime for which the defendant was convicted did not warrant the death penalty, but nevertheless opt for death because of other, uncharged criminal activity that met the criteria set forth in Penal Code Section 190.3, subdivision (b). Still other jurors could believe that the defendant did not engage in other criminal conduct that involved force or violence but nevertheless decide that a death sentence was warranted because of the defendant's prior conviction of a felony. *Id.* §190.3(c). And, of course, some jurors might believe that more than one aggravating factor exists in a particular case but disagree as to the weight to be given each factor.

Accordingly, the statutory aggravating factors give the jury little guidance in making this life-or-death decision. In particular, the aggravating factors cannot perform the winnowing function mandated by *Furman* and its progeny. Indeed, this Court has recognized that the aggravating factors "do not perform a 'narrowing' function." *People v. Bacigalupo*, 6 Cal. 4th 457, 477 (1993); *see also People v. Cornwell*, 37 Cal. 4th 50, 102 (2005), *overruled on other grounds by People v. Doolin*, 45 Cal. 4th 390 (2009); *People v. Visciotti*, 2 Cal. 4th 1, 74–75 (1992), *rev'd on other grounds*, 537 U.S. 19 (2002).

There are two reasons why that is so. To begin with, the aggravating factor set forth in Section 190.3(a) simply reiterates the fact of the defendant's conviction and the special circumstance finding. Thus, every convicted defendant who faces a penalty trial is, by definition, subject to an aggravating factor finding under this portion of the statute. Consequently, this aggravating factor offers the jury no "'meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.'" *Gregg*, 428 U.S. at 188 (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

Nor do the other aggravating factors listed in Section 190.3. Many convicted murderers are accused of other "criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." PENAL CODE §190.3(b). Yet the statute gives the jury no guidance for distinguishing between cases where this

factor significantly increases the defendant's culpability from those where it does not. Likewise, whether a defendant has been previously convicted of a felony (a broad category that includes even non-violent offenses) may or may not be relevant to the jury's decision, but the jury is given no guidance in making this decision.

Amici recognize that the Supreme Court has held that such guidance is not constitutionally required as a matter of federal constitutional law. *See Tuilaepa v. California*, 512 U.S. 967, 978–79 (1994); *Zant v. Stephens*, 462 U.S 862, 875 (1983). But the fact that a "capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision" (*Tuileapa*, 512 U.S. at 979), is only the beginning, and not the end, of the inquiry.

"Nowhere in the law is the interplay of procedural rules and substantive standards more critical than in the penalty phase of a capital case." *State v. Wood*, 648 P.2d 71, 81 (Utah 1982). Indeed, "[e]ven if Solomon-like wisdom were available in framing objective standards, their whole purpose could be thwarted if the governing procedural rules allowed the sentencing body to impose the death penalty in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of that penalty." *Id.* That is even more true when implementing standards that were designed to entrap every murderer, rather than those judged worthy of death by the wisdom of Solomon.

The cases cited above hold that a jury need not be given any *substantive* guidance as to when to impose the death penalty. Accordingly, the lack of *substantive* standards, coupled with the rule against arbitrariness, demands that the jury's decision be subject to stringent *procedural* safeguards. And these safeguards are not novel; instead, they are part and parcel of the "inviolate" jury trial right protected by Penal Code Section 1042 and Article I, Section 16 of the California Constitution.

A. Failure To Require That The Jury Choose Death Beyond A Reasonable Doubt Increases The Arbitrariness In Violation Of The Constitutional Command That The Death Penalty Be Reserved For The Worst Offenses.

As the Supreme Court held in *In re Winship*, 397 U.S. 358 (1970), the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *Id.* at 363. That is so for multiple reasons. In the first place, applying a reasonable doubt standard reduces the likelihood of an erroneous decision where important interests are at stake. As *Winship* stated:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. (*Id.* at 364 (citation, internal quotation marks and ellipses omitted))

Moreover, the reasonable-doubt standard also "'impresses on the trier of fact the necessity of reaching a subjective state of

certitude of the facts in issue." *Id.* (citation and internal quotation marks omitted).

"These considerations assume profoundly greater importance in the process of determining whether a person convicted of murder shall be sentenced to death." *People v. Tenneson*, 788 P.2d 786, 795 (Colo. 1990). As current and former district attorneys, amici understand that it is harder for a prosecutor to secure a death sentence if the jury is told that it must choose death beyond a reasonable doubt, particularly in comparison to the present system where the jury is not given any burden of proof by which to measure whether "the aggravating circumstances outweigh the mitigating circumstances." PENAL CODE §190.3. But that is a virtue, not a defect, in any death penalty scheme that seeks to distinguish between "'the few cases in which it is imposed from the many cases in which it is not.'" *Gregg*, 428 U.S. at 188 (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)). In other words, applying the reasonable doubt standard to the penalty phase will help reduce the arbitrariness inherent in California's death penalty scheme by helping to ensure that the death sentence is chosen for only the worst offenders and the worst offenses.

This winnowing function cannot occur in states where this standard is not applied. Indeed, the death penalty is imposed more frequently in states that do not apply a reasonable doubt requirement to the penalty phase.[9]

[9] *See* Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, (. . . continued)

Conversely, "[t]o impose the death penalty, notwithstanding serious doubt as to its appropriateness, would create in some cases . . . a substantial possibility of "'arbitrary . . . treatment . . . .'" *Wood*, 648 P.2d at 83.

In addition, the reasonable doubt standard is also commensurate with the defendant's interest at stake. *Winship* held that the reasonable doubt standard should be applied in juvenile cases to reduce the margin of error, because of the "transcending value" of the defendant's interest in liberty. *See* pp.39–40, *supra*. But that is even more true when the defendant's life is at stake, where the consequences of an erroneous decision are increased by the irrevocability of a death sentence. In that context, there are compelling reasons to reduce the likelihood of error as to the defendant by requiring the state to prove its case for death beyond a reasonable doubt. *See Conservatorship of Hofferber*, 28 Cal. 3d 161, 178 (1980) ("Fact-finding error must be minimized when such drastic consequences are at stake. Hence, the facts that trigger confinement must generally be proved to a unanimous jury beyond a reasonable doubt.").

Finally, as *Winship* noted in an analogous context, using the reasonable doubt standard impresses on the jury's mind the importance of being certain that death is the appropriate penalty. *See Tenneson*, 788 P.2d at 794 ("the term 'beyond a

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70 ARK. L. REV. 267, 300 (2017) (none of the five states that imposed the death penalty most often between 2010 and 2015 applies the reasonable doubt standard to either the determination that aggravating factors outweigh mitigating ones or the ultimate penalty decision).

reasonable doubt' serves well to communicate to the jurors the degree of certainty that they must possess that any mitigating factors do not outweigh the proven statutory aggravating factors before arriving at the ultimate judgment that death is the appropriate penalty"); *Wood,* 648 P.2d at 84 (beyond a reasonable doubt standard "conveys to a decision maker a sense of the solemnity of the task and the necessity for a high degree of certitude . . . in imposing the death sentence.").

In this context, jurors are supposed to bring to bear the collective moral judgment of the community on the defendant and his or her offense. But a jury that opts for death on the basis of a belief that the evidence favors death only slightly, or that harbors reasonable doubts about that choice, has not made a choice that is commensurate with the consequences. Instead, "no defendant should suffer death unless a cross section of the community unanimously determines that should be the case, under a standard that requires them to have a high degree of confidence that execution is the just result." *Rauf v. State*, 145 A.3d 430, 437 (Del. 2016) (Strine, C.J., concurring); *see also Mills v. Maryland*, 486 U.S. 367, 383–84 (1988) ("The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."). Indeed, "a determination of death despite reasonable doubt as to its

justness would be unthinkable. We can think of no judgment of any jury . . . in any case that has as strong a claim to the requirement of certainty as does this one." *State v. Biegenwald*, 524 A.2d 130, 155 (N.J. 1987).

These concerns are not assuaged be arguing that the decision to impose a death sentence is a normative decision, not a factual one. *See* Third Supp. Resp. Br. 25. In the first place, the "issues of fact" encompassed by Section 1042 do not exclude normative determinations, but only issues of law that must be decided by a court rather than a jury. *See* Brief of Amicus Curiae, Hadar Avirim & Gerald Uelmen, Constitutional Law Scholars, In Support of Defendant-Appellant McDaniel, at 11–14. In any event, the need to distinguish between the few murderers who supposedly deserve death from those who do not does not turn on whether that assessment is purely factual. Nor does the increased reliability that would be caused by use of a reasonable doubt standard disappear merely because that decision involves normative elements. *See Biegenwald,* 524 A.2d at 156 (adopting beyond a reasonable doubt standard for weighing aggravating and mitigating factors while recognizing that the weighing process is a judgmental determination based on conflicting values, not a fact-finding process). To the contrary, the supposedly normative elements of the penalty determination increase, rather than decrease, the need to apply the reasonable doubt standard.

B. Failure To Require That The Jury Find The Aggravating Factors Unanimously Also Increases Arbitrariness In Violation Of The Constitutional Command That The Death Penalty Be Reserved For The Worst Offenses.

The jury unanimity issue posed by the Court is a narrow one: whether a jury must unanimously decide whether the defendant engaged in other "criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." PENAL CODE §190.3(b).[10] This issue is critical for two reasons. First, "[e]vidence of a prior criminal record is the strongest single factor that causes juries to impose the death penalty." *People v. McClellan*, 71 Cal. 2d 793, 804 n.2 (1969); *People v. Robertson*, 33 Cal. 3d 21, 54 (1982) (referring to "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination"); *People v. Polk*, 63 Cal. 2d 443, 450 (1965) (other crimes evidence "may have a particularly damaging impact on the jury's determination whether the defendant should be executed").[11] Second, the Court already requires the existence of prior criminal conduct to be proved

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[10] In theory, the jury unanimity requirement should also apply to the aggravating factors set forth in subdivisions (a) and (c), but by definition the jury has already unanimously decided both the defendant's guilt and the existence of a special circumstance, thus satisfying subdivision (a), and the existence of a prior felony under subdivision (c) will rarely be the subject of a factual dispute.

[11] This Court's repeated recognition that "other crimes" evidence is "particularly damaging" at the penalty phase conflicts with its statement that requiring unanimity as to these allegations "would immerse the jurors in lengthy and complicated discussions of matters *wholly collateral* to the penalty determination which confronts them." *People v. Ghent*, 43 Cal. 3d 739, 773–74 (1987) (emphasis added).

beyond a reasonable doubt (*Robertson*, 33 Cal. 3d at 53–54), and jury unanimity is necessary to make that requirement meaningful. For example, if 11 penalty phase jurors believe that the existence of other crimes has not been established, how can the existence of that factor have been proved beyond a reasonable doubt? That is why "jury unanimity and the standard of proof beyond a reasonable doubt are slices of the same due process pie." *Conservatorship of Roulet*, 23 Cal. 3d 219, 231 (1979).

Even apart from these considerations, requiring jury unanimity is a vital aspect of the jury trial right. After all, "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 (1896). That is because jury unanimity is an important safeguard in ensuring reliability and preventing arbitrariness, for multiple reasons.[12]

First, the unanimity requirement typically results in longer deliberations. In the absence of a unanimity requirement, "once a vote indicates that the required majority has formed, deliberations halt in a matter of minutes." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations,* 113

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[12] The analysis that follows is drawn from the brief amici curiae filed by the California Attorney General and his counterparts in numerous other states in *Ramos v. Louisiana*, —U.S.—, 140 S. Ct. 1390 (2020). *See* Amici Brief for States of New York, California et al., 2019 WL 2576549, at *13–*19 (June 18, 2019). As Appellant notes in his reply brief, the Attorney General has not explained why the unanimity requirement is necessary to ensure reliability in a non-capital case but not in a capital one. *See* 3d Supp. Reply Br. 62.

HARV. L. REV. 1261, 1272 (2000) ("*Empty Votes*"). Indeed, research shows that deliberation time often corresponds to the number of jurors required to reach a verdict. *See, e.g.* REID HASTIE ET AL., INSIDE THE JURY 173–74 (1983); Dennis J. Devine, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 PSYCH. PUB. POL'Y & L. 622, 669 (2001). For example, one mock-jury study found that 12-member juries required to reach unanimous verdicts in a murder case deliberated for an average of 135 minutes, whereas those required to reach eight- or ten-member majorities deliberated for an average of 75 minutes and 103 minutes, respectively. HASTIE, *supra*, at 60. This pattern is also visible in real-world trials. As one Louisiana juror noted after rendering a split verdict in a high-profile murder case, "[w]e knew that we only needed 10 jurors to convict, so we set out for that goal rather than the full 12." John Simerman, *Split Verdict in Cardell Hayes' Trial Shines Light on How Louisiana's Unusual Law Affects Jury Deliberations*, NEW ORLEANS ADVOC. (May 1, 2018).

Second, non-unanimous juries are substantially more likely to adopt a "verdict-driven," rather than an "evidence-driven," approach to deliberation. HASTIE, *supra*, at 165. "Verdict-driven" deliberations typically begin with a preliminary vote, focus on each juror's preferred verdict, and discuss evidence to the extent it supports a specific verdict position. *Id.* at 163. By contrast, "evidence-driven" deliberations focus on a review of the evidence "without

reference to the verdict categories, in an effort to agree upon the single most credible story that summarizes the events at the time of the alleged crime." *Id.* Unsurprisingly, the jury's review of evidence is "more disjointed and fragmentary in verdict-driven than evidence-driven" deliberations. *Id.* at 164. Other studies show that juries operating under non-unanimous rules "discuss both the law and evidence less, recall less evidence, and were less likely to correct their own mistakes about the evidence or the jury instructions." Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,* 40 U. MICH. J.L. REFORM 569, 580 (2007) (internal quotation marks omitted). This research suggests that permitting factual disputes relating to aggravating circumstances to be decided without jury unanimity "discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable." *Empty Votes*, *supra,* at 1273.

Third, a unanimity requirement ensures that juries evaluate and respond to the viewpoints of every individual juror prior to rendering a verdict. As then-Circuit Judge Anthony Kennedy observed, "[t]he dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978). "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be

examined, and if possible, accepted or rejected by the entire jury." *Id.*

Fourth, and finally, the unanimity requirement ensures that the representative nature of the jury is reflected in its deliberations. "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel v. S. Pac. Co.,* 328 U.S. 217, 220 (1946); *see also Johnson v. Louisiana,* 406 U.S. 399, 402 (1972) (Marshall, J., dissenting) (jury's "fundamental characteristic is its capacity to render a commonsense, laymen's judgment, as a representative body drawn from the community"). The unanimity requirement ensures that a jury which is drawn from a fair cross-section of the community actually considers the diverse views of its members, rather than subordinating the views of minority jurors to those of the majority. That is particularly important as a corrective to a system where, unfortunately, decisions to seek the death penalty are influenced by the race of the defendant and/or the victim. *See* pp.31–32, *supra.*

All these factors led the Attorney General to tell the United States Supreme Court that jury unanimity is required for criminal convictions, a position that the Court adopted. *Ramos v. Louisiana*, 140 S. Ct. at 1390. The same reasons apply to the jury's life-or-death decisions in the penalty phase.

CONCLUSION

The empirical evidence cited above demonstrates that implementation of California's death penalty scheme is still

characterized by arbitrariness and discrimination. Accordingly, the Court should require the highest possible procedural protections before a jury imposes a death sentence. In criminal cases, those procedural protections traditionally require jurors to reach unanimous verdicts beyond a reasonable doubt. Indeed, the prior decisions that the capital jury makes in the course of the capital decision-making process—a finding of guilt for the potentially capital crime and a finding that at least one special circumstance is true—do require unanimous, beyond a reasonable doubt decisions. Why should the ultimate life and death decision itself be governed by anything less? The Court should therefore hold that Article I, Section 16 of the California Constitution and Penal Code Section 1042 require that the jury in the penalty phase of a capital case (1) decide beyond a reasonable doubt that death is the appropriate sentence and (2) be instructed that it must unanimously agree on the existence of the aggravating factor set forth in Penal Code Section 190.3, subdivision (b), and, where applicable, any other aggravating factor set forth in the statute.

DATED: October 26, 2020

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.204 AND 8.520

Pursuant to California Rules of Court 8.204 and 8.520, and in reliance upon the word count feature of the software used to prepare this document, I certify that the foregoing **Brief Amici Curiae of Six Present or Former District Attorneys Diana Becton, Chesa Boudin, Gil Garcetti, George Gascón, Jeffrey Rosen, and Tori Verber Salazar in Support of Appellant** contains 7,336 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

DATED: October 26, 2020

/s/ Steven L. Mayer
STEVEN L. MAYER

PROOF OF SERVICE
Supreme Court No. S171393
(Los Angeles County Super. Ct. No. TA074274)

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Tenth Floor, San Francisco, California 94111-4024.

On October 26, 2020, I served the document described as **APPLICATION OF SIX PRESENT OR FORMER DISTRICT ATTORNEYS (DIANA BECTON, CHESA BOUDIN, GIL GARCETTI, GEORGE GASCÓN, JEFFREY ROSEN, AND TORI VERBER SALAZAR) TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT AND BRIEF AMICI CURIAE** on the interested parties in this action by sending a true copy addressed to each through TrueFiling, the electronic filing portal of the California Supreme Court, pursuant to Local Rules, which will send notification of such filing to the email addresses denoted on the case's Electronic Service List:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on October 26, 2020.

_____
Name

Exhibit E
California Innocence Coalition,
Innocence and the Death Penalty

March 4, 2021

To: Penal Code Review Committee
From: California Innocence Coalition (California Innocence Project (CIP), Northern California Innocence Project (NCIP), Loyola Project for the Innocent (LPI))

Re: Innocence and the Death Penalty--The Data and Contributing Factors

The History

When, in the 1940's, thousands of men of color were lynched for ostensible crimes, the NAACP's Legal Defense Fund (LDF) undertook to represent them, not only to defend their rights but also to demonstrate the vicious racism that drove the lynchings. In a 1949 memorandum, Thurgood Marshall, director of the LDF, laid out the "types of criminal cases" the LDF would accept and highlighted those where the man was innocent. Since then, the work of the LDF and subsequent work of innocence organizations demonstrates that racism has always been and continues to be a contributing factor in the imposition of the death penalty.

For more than 30 years, innocence organizations throughout the country have proven that systemic issues that pervade the criminal legal system cause innocent men and women to have been wrongfully convicted and sentenced to death. There are currently 68 innocence organizations throughout the world and three in the state of California. The cases demonstrate not just the need to permanently repeal the death penalty in California out of fear of executing an innocent person, but also to promote broader criminal justice reforms.

The Data

According to the National Registry of Exonerations[1], there have been **2,749 known exonerations** in the US since 1989. Nationwide, **185 innocent men have been exonerated from death row**. [2] National Geographic published an exposé in its March 2021 issue featuring the stories of a number of those who were sentenced to death and later exonerated and examined the causes of those wrongful convictions.[3] And a 2014 study published in the *Proceedings of the National Academy of Sciences* concluded that there are far more innocent people who have been sentenced to death than the legal process has actually uncovered.[4]

Equally concerning: an additional 192 exonerations involve innocent people who narrowly escaped the death penalty and were instead sentenced to life without the possibility of parole. But for the prosecutor's charging decision or the jury's penalty phase verdict, these exonerated people would also have been sentenced to death and some could well have been executed before they were able to prove their innocence.[5]

To date, in California, five men—all Black, Brown, Indigenous, or People of Color—have been sentenced to death and later exonerated.[6] LPI currently has five death penalty cases under active

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[1]The National Registry of Exonerations (NRE) "is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. It was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. The Registry provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongfully convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonerations prior to 1989." (http://www.law.umich.edu/special/exoneration/Pages/about.aspx.)

[2] https://deathpenaltyinfo.org/news/dpic-adds-eleven-cases-to-innocence-list-bringing-national-death-row-exoneration-total-to-185

[3] https://www.nationalgeographic.com/history/article/sentenced-to-death-but-innocent-these-are-stories-of-justice-gone-wrong

[4] https://www.pnas.org/content/111/20/7230 [explaining that many innocent death row defendants are not identified because they were taken off death row and given a lesser sentence before their innocence could be proven: "Most of these undiscovered innocent capital defendants have been resentenced to life in prison, and then forgotten."].

[5](http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Sentence&FilterValue1=Life%20without%20parole. (Last visited February 24, 2021).)

[6]Ernest Graham, Troy Jones, Oscar Morris, Patrick Croy, and Vincente Benavides. http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Sentence&FilterValue1=Death&FilterField2=ST&FilterValue2=CA; https://deathpenaltyinfo.org/policy-issues/innocence-database

review where credible new evidence points to the innocence of those convicted.

Additionally, people on California's death row are unconscionably forced to wait decades to be appointed the post-conviction counsel to whom they are entitled to investigate and pursue their claims of innocence. The situation is so dire that, to date, a significant number of condemned men have died on death row primarily from natural causes and suicide, still waiting for the courts to hear their claims of wrongful conviction.[7] It is a virtual certainty that some of the men who have died on death row while waiting to prove their innocence were, in fact, innocent.[8]

Of the 212 known exonerations in California since 1989, 11% were sentenced to death or life without the possibility of parole and 64% of the innocent men and women wrongfully convicted in our State are Black, Brown, Indigenous, or People of Color.[9]

The Causes

Over the last thirty years, innocence cases have exposed many of the causes that contribute to wrongful convictions. In most cases, it is a combination of factors that resulted in the innocent person's decades-long wrongful incarceration. The identified contributing causes of wrongful convictions include[10]: (1) official misconduct, (2) bad lawyering, (3) faulty forensic evidence, (4) false confessions, (5) mistaken eyewitness identification, and (6) incentivized jailhouse informants. In its 2008 Final Report, the California Commission on the Fair Administration of Justice[11]

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[7] As of 2010, 32 men who passed away on death row had habeas petitions alleging various claims, including that they were wrongfully convicted, pending before the federal courts. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1030&context=llr. Since then, an additional 73 men have died on death row, many of whom also had unresolved wrongful conviction claims pending in the state and federal courts. https://www.cdcr.ca.gov/capital-punishment/condemned-inmates-who-have-died-since-1978/

[8] LPI is currently reviewing a posthumous capital case involving DNA that would potentially exonerate the now-deceased defendant, had it been tested before his death.

[9]http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=CA

[10] https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx; see also https://innocenceproject.org/dna-exonerations-in-the-united-states/

[11] The California Commission on the Fair Administration of Justice was a blue-ribbon, bi-partisan panel created by the California Senate to review literature and receive testimony and, based on what was learned, to issue a report and recommendations to "present a hefty agenda of reform for the Legislature and Governor, as well as many recommendations of best practices for prosecutors, defense lawyers, judges, and police agencies," to "reduce the risk of wrongful convictions in California." California Commission on the Fair Administration of Justice, "California Commission on the Fair Administration of Justice Final Report" (2008). Northern California Innocence Project Publications. Book 1.

identified the above as factors "enhancing the risk of wrongful convictions" and observed that they "were equally present in capital and non-capital cases."[12] Additionally, the more pervasive causes of innocent men sentenced to death in California included official misconduct, withholding of exculpatory evidence, and faulty forensics.[13] While our legislature recently addressed the risks of mistaken eyewitness identification with the passage of SB 923 (Wiener), there is still a need for our state to address problems involving prosecutor and police misconduct by increasing transparency and accountability in these agencies as well as the proper creation and implementation of conviction review units. There is a need to properly fund and provide resources to defense communities. With the advancements and increased scrutiny of forensic science, there is a need to adequately train stakeholders, including the judiciary, prosecutors and defense attorneys, so that the courts are better situated to prevent convictions based on invalid or flawed science. And, despite continuing scandals involving incentivized informants that pose a threat not just to the innocent but also the victims and survivors of crime, there is a need to ban the practice.

The Impact

We are beyond the time when our courts, lawyers, or other stakeholders in our criminal legal system can deny that innocent people are convicted, incarcerated and sentenced to death by our State. Those wrongfully convicted and released face a crushing struggle to return to society after having faced execution and deprivation of years of their life. The victims and survivors have thought they had justice only to be shattered to learn that had not. The damage of a wrongful conviction to a person, his family, and his community is irreparable. When we cannot deny the data and the contributory factors that lead to the incarceration of innocent people, we cannot have a punishment that is impossible to rectify or repair when our system gets it wrong.

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[12] California Commission on the Fair Administration of Justice, "California Commission on the Fair Administration of Justice Final Report" (2008). Northern California Innocence Project Publications. Book 1, pg. 126.

[13]http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=CA&FilterField2=Sentence&FilterValue2=Death

Exhibit F
Office of the State Public Defender,
Letter to Committee Chair

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March 16, 2021

Michael Romano
Chairperson
Committee on Revision of the Penal Code

Dear Mr. Romano:

The Office of the State Public Defender is grateful that the Committee on Revision of the Penal Code is taking up the topic of the death penalty. The enclosed White Paper Report represents OSPD's perspective on the current state of the death penalty based on decades of experience representing indigent defendants sentenced to death in California.

As discussed in our Paper, it has been over 12 years since the Commission on the Fair Administration of Justice concluded that California's death penalty was "dysfunctional" and would require a dramatic infusion of resources and significant reforms to be set right. Our Paper concludes that the time for reform has passed. The intractable problems identified by the Commission over a decade ago have only worsened.

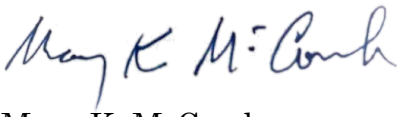
Our Paper explains that California's death penalty is broken beyond repair:

- It is applied in a racially discriminatory manner;
- A handful of counties impose the vast majority of death sentences, without regard to underlying crime rates;
- The death penalty is not imposed on the worst of the worst but disproportionately on young offenders, especially youth of color, on people who are seriously mentally ill or intellectually disabled, on people who have suffered extreme childhood trauma, and even on those who are innocent;
- The arbitrary application of the law is exacerbated by
    - the uneven quality of indigent defense, and
    - the failure to limit the prosecution to one penalty trial;
- Taxpayers pay billions to defend death judgments that are most often reversed after decades of litigation; and

- The system is characterized by delay and dysfunction because there are simply not enough lawyers to represent the hundreds of people who have been sentenced to death – a problem made worse by the passage of Proposition 66.

We hope the Committee will consider our Paper in making your recommendations. We are happy to answer any questions your staff or members of the Committee may have.

Sincerely,



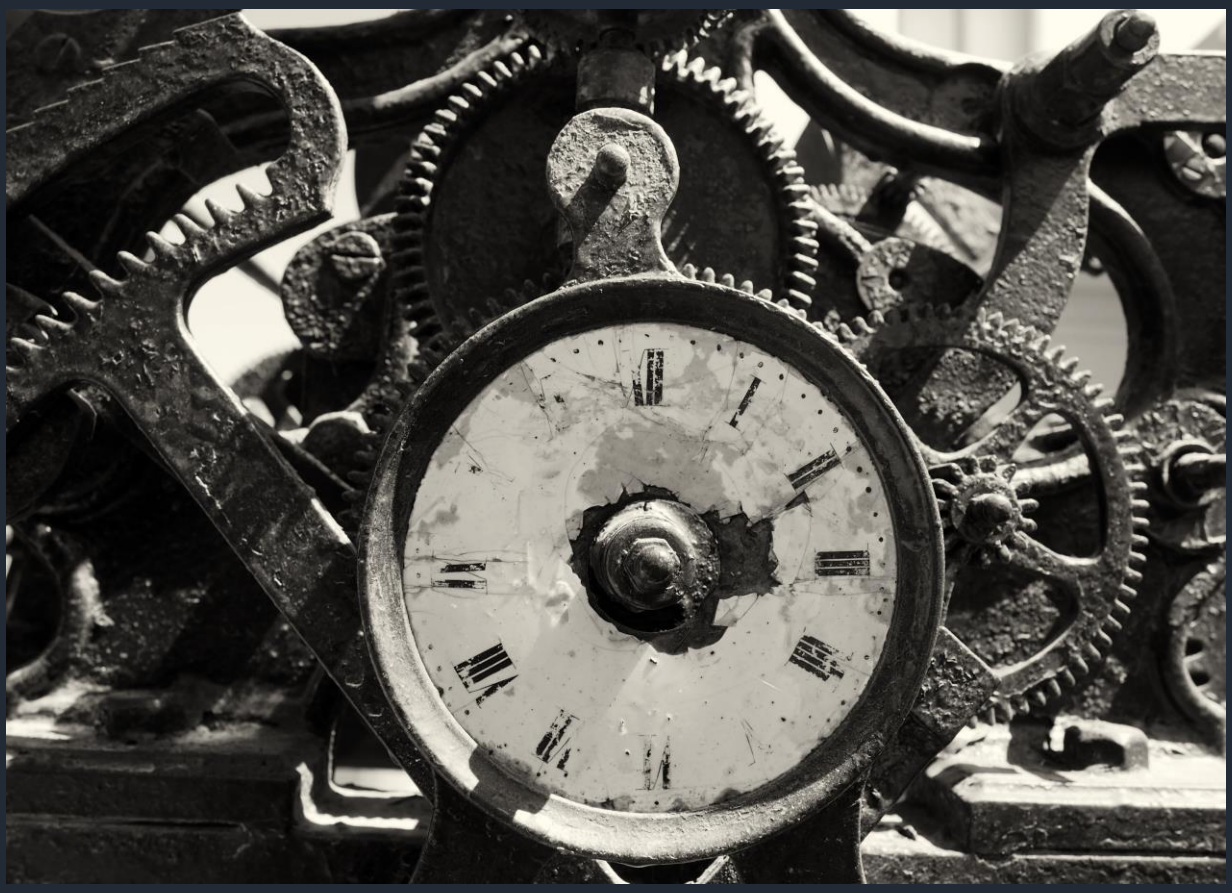
Mary K. McComb
State Public Defender

Encl.

Exhibit G
Office of the State Public Defender,
California's Broken Death Penalty

CALIFORNIA'S BROKEN DEATH PENALTY:

It's Time to Stop Tinkering with the Machinery of Death



A White Paper Report
by the Office of the State Public Defender

Submitted to the Committee on Revision of the Penal Code
March 2021

ABOUT OSPD

The Office of the State Public Defender (OSPD) has been an eyewitness to California's modern death penalty since it was reinstated in 1976. OSPD was created in 1975 by then Governor Brown to provide indigent defendants their constitutional right to counsel in any case where the defendant was entitled to counsel appointed at public expense. The intent of the statute was to raise the standards of the defense appellate bar overall, but as death penalty conviction rates rose during the 1980's and 1990's, death penalty cases quickly swamped OSPD's caseload. Beginning in 1997, OSPD's statutory mission was altered to focus primarily on death penalty appeals. Since then, OSPD has represented hundreds of individuals on appeal of their capital convictions and has extensive expertise in all aspects of capital litigation. That work has often been deeply frustrating. As this report discusses, reversal rates on direct appeal have been very low in California for the last thirty years, and our clients have often had to wait decades to win relief on meritorious claims. Many others are in limbo, still awaiting the appointment of habeas counsel. Nevertheless, OSPD's attorneys persisted.

Recently, as the nation grappled yet again with racism in policing and the criminal legal system, OSPD devoted additional resources to its amicus program and to developing systemic legal claims, with a focus on racism and other inequities in the death penalty and in other aspects of criminal law. In 2020, OSPD assumed additional responsibilities to assist the State in meeting its obligation to provide counsel to indigent defendants at the trial level by providing training and technical assistance and otherwise engaging in efforts to improve public defense. As part of this mandate, OSPD has partnered with trial counsel charged with the immense task of representing individuals charged with death eligible crimes.

OSPD's decades of experience on the frontlines of death penalty litigation in California are reflected in this report and its conclusion that the death penalty is broken beyond repair.

Mary K. McComb
State Public Defender
March 16, 2021

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INTRODUCTION

Over twelve years ago, the California Commission on the Fair Administration of Justice ("the Commission") issued a report concluding that California's death penalty was "dysfunctional" and could be fixed only by either (a) dramatically increasing funding for all stages of the capital process; (b) narrowing the scope of the death penalty; or (c) abolishing the death penalty.[1] The State of California has done none of these things.

Eleven years after the Commission's report, Governor Newsom declared a moratorium on executions, stating "California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer."[2] The moratorium does not solve any of these problems, though. Since the moratorium was announced in March 2019, prosecutors have obtained 8 death sentences[3] and dozens of other capital cases are pending in trial courts throughout the state, many delayed because of the COVID-19 pandemic. The moratorium also has not halted post-conviction proceedings in the hundreds of cases where a death sentence has already been imposed.

The current situation demonstrates that there is no political will, and no reasonable path, to "fix" California's death penalty. As the state struggles to emerge from a pandemic that has stretched resources thin, doubling down on the death penalty is not a defensible priority. Legislative measures could remedy some of the problems identified in this Paper, but they would only further jerry-rig California's expensive and ineffective "machinery of death."[4] The only solution is to dismantle it altogether.

Ending capital punishment in California is a difficult proposition because our current death penalty law was enacted by initiative and can therefore be eliminated only by the same means (or by a court decision finding the law unconstitutional). Two initiatives to abolish the death penalty failed narrowly in recent years, one in 2012

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[1] Cal. Com. on the Fair Administration of Justice, Final Report, Death Penalty (2008), pp. 112-182 (hereafter CCFAJ Report).

[2] Governor's Exec. Order N-09-19 (Mar. 13, 2019) <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf> (as of Feb. 3, 2021).

[3] Habeas Corpus Resource Center, Annual Report 2020 (2020) p. 8 (hereafter HCRC Report).

[4] *Callins v. Collins* (1994) 510 U.S. 1141, 1145 (conc. opn. of Blackmun, J.) ("From this day forward, I no longer shall tinker with the machinery of death.").

and one in 2016.[5] In both instances, a high percentage of voters were undecided going into the election.[6] In 2016, many voters were confused by a competing initiative – Proposition 66 – which falsely promised to reform California's death penalty by shortening time limits and changing procedures for the appointment of counsel.[7] Californians, confronting these initiative measures in a vacuum of information, voted by slim margins to retain the death penalty.[8]

Justice Thurgood Marshall believed that if people were informed about the flaws in the death penalty—including that it is imposed in a discriminatory manner, that the innocent are sentenced to death, and that it "wreaks havoc with our entire criminal justice system"—they would support abolition.[9] The flaws Justice Marshall identified nearly 50 years ago are all evident today in California.

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[5] In 2012, Proposition 34 failed by just 48 to 52 percent < https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012)> (as of Feb. 22, 2021). In 2016, Proposition 62 failed by 47 to 53 percent. < https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65> (as of Feb. 22, 2021).

[6] For example, in a USC Dornsife/LA Times poll conducted between October 22 and 30, 2016, voters were narrowly divided with 43 percent in favor of the repeal measure, Proposition 62, 46 percent against, and 11 percent undecided. < https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65> (as of Feb. 22, 2021). The same USC Dornsife/LA Times poll conducted in mid-October 2012 found 42 percent in favor of the abolition measure and 45 percent of voters opposed, with 13 percent undecided. < https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012) > (as of Feb. 22, 2021).

[7] See *Briggs v. Brown* (2017) 3 Cal.5th 808, 854 (the judicial deadlines in the new statutes are not binding but only "aspirational"). As Justice Liu noted in his concurring opinion in *People v. Potts* (2019) 6 Cal.5th 1012, 1066:

> Proposition 66 thus did not enact or put to the voters the key reforms that leading authorities consider fundamental to a workable death penalty system. Proposition 66 did not reduce the bottlenecking of direct appeals in this court. It did not provide additional resources to enable this court, the courts of appeal, or the trial courts to expedite capital cases. And it did not provide additional resources for appointment of qualified counsel.

[8] See note 4, *supra*. Proposition 66 passed narrowly, 51 to 49 percent. < https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)> (as of Feb. 22, 2021).

[9] *Furman v. Georgia* (1972) 408 U.S. 238, 363-364 (conc. opn. of Marshall, J.).

If Justice Marshall was right, then Californians once fully informed about the dysfunction of the death penalty, its inequities, and its human and monetary costs, will decide finally to abandon it.

Indeed, since the Commission's report in 2008, eight other states – Colorado, Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Mexico, and Washington – have abolished the death penalty, bringing the number of states without the death penalty to 22.[10] Virginia is poised to bring the number of abolitionist states to 23.[11]

I. A BRIEF HISTORY OF CALIFORNIA'S MODERN DEATH PENALTY

The failure of the modern death penalty experiment in California and nationally is rooted in a series of court decisions and the responses to them.

In February 1972, the California Supreme Court ruled that the death penalty violated the state constitutional prohibition of cruel or unusual punishments.[12] In June of the same year, the United States Supreme Court held in *Furman v. Georgia* that the death penalty violated the Eighth Amendment's prohibition of cruel and unusual punishment because it was imposed arbitrarily on only a handful of defendants convicted of murder. As Justice Potter Stewart explained, the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[13] Laws that "permit this unique penalty to be so wantonly and so freakishly imposed," he wrote, violate the Eighth and Fourteenth Amendments.[14] Other justices stressed that "untrammeled discretion" in the imposition of capital

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[10] Death Penalty Information Center (DPIC), *State by State* <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (as of Feb. 22, 2021).

[11] Pilkington, *Virginia All But Certain To Become First Southern State To Abolish Death Penalty,* The Guardian (Feb. 5, 2021) <https://www.theguardian.com/us-news/2021/feb/05/virginia-first-southern-state-abolish-death-penalty> (as of Feb. 22, 2021).

[12] *People v. Anderson* (1972) 6 Cal.3d 628. The *Anderson* court broadly condemned the death penalty as "impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process." *Id.* at p. 656

[13] *Furman v. Georgia, supra,* 408 U.S. at p. 309 (conc. opn. of Stewart, J.).

[14] *Id.* at p. 310 (conc. opn. of Stewart, J.).

punishment "was an open invitation to discrimination."[15] The *Furman* Court left open the possibility that the constitutional flaws it identified could be cured if death penalty laws were rewritten to limit discretion and to apply more narrowly.

California, anticipating a national trend, promptly reinstated capital punishment. In November 1972, over two-thirds of California voters approved Proposition 17, which superseded *Anderson* by amending the California Constitution to expressly authorize the death penalty.[16] In 1973, California responded to *Furman* by adopting a mandatory death penalty law that eliminated all sentencing discretion.[17] Other states also swiftly enacted new capital sentencing laws intended to address *Furman*'s concerns.[18]

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[15] *Id.* at p. 365 (conc. opn. of Marshall, J.); accord *id.* at p. 255 (conc. opn. of Douglas, J.). See Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty (2018) p. 6 (noting justices condemned two contrary aspects of arbitrariness – randomness and discrimination) (hereafter Deadly Justice); Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (2011 ed.) pp. 215-218 (same).

[16] <https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972)> (as of Feb. 22, 2021) (Proposition 17 was approved by 67.5 percent of voters in 1972). Article I, section 27 provides in full:

> All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.
>
> The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.

[17] Stats. 1973, ch. 719, p. 1297. Seventeen other states also adopted mandatory sentencing provisions in response to *Furman*. Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence* (2004) 31 Hastings Const. L.Q. 189, 207.

[18] Deadly Justice, *supra*, at pp. 10-11 (by the end of 1974, 28 states had reenacted death penalty laws; 6 more followed in 1975).

In 1976, the Supreme Court struck down mandatory death penalty laws, holding that capital sentencing must be individualized.[19] Another type of revised death penalty statute fared better, however – those based on the American Law Institute's Model Penal Code. Just four years after *Furman*, the high court expressed hope that this new generation of capital sentencing statutes would "ensure that the penalty would be applied reliably and not arbitrarily."[20] These "statutes, and the decisions upholding them, provided the blueprint for the modern American death penalty."[21]

California's next death penalty law, enacted in 1977, drew on the Model Penal Code paradigm.[22] Once the jury found true the existence of a special circumstance,

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[19] *Woodson v. North Carolina* (1976) 428 U.S. 280; *Roberts v. Louisiana* (1976) 428 U.S. 325. The California Supreme Court found the 1973 mandatory death penalty law unconstitutional in light of *Woodson* and *Roberts*. *Rockwell v. Superior Court* (1976) 18 Cal.3d 420.

[20] *Glossip v. Gross* (2015) 576 U.S. 863, 908-909 (dis. opn. of Breyer, J.); *Gregg v. Georgia* (1976) 428 U.S. 153, 193-195 (joint op. of Stewart, Powell, and Stevens, JJ.), citing Model Pen. Code & Commentaries, com. 3 to § 201.6, p. 71 (Tent. Draft No. 9, 1959); *Jurek v. Texas* (1976) 428 U.S. 262, 270 (comparing Texas law to MPC); *Proffitt v. Florida* (1976) 428 U.S. 242, 247-248 (Florida statute based on MPC); Steiker & Steiker, *Part II: Report to the ALI Concerning Capital Punishment* (2010) 89 Tex. L.Rev. 367, 368-369 (prepared at the request of ALI Director Lance Liebman) (noting that, prior to 1972, states had largely ignored section 210.6 of the Model Penal Code but turned to it after *Furman* "as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts") (hereafter Steiker & Steiker, ALI Report).

[21] Steiker & Steiker, ALI Report, *supra*, 89 Tex. L.Rev. at p. 369; see also Covey, *supra,* 31 Hastings Const. L.Q. at p. 208 ("[v]irtually every death penalty jurisdiction now follows the MPC model with greater or lesser variations"); accord, *Davis v. Mitchell* (6th Cir. 2003) 318 F.3d 682, 686 ("After *Furman* was decided in 1972, many states incorporated aspects of the Model Penal Code in their statutes reinstating the death penalty."); Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt* (2001) 21 N. Ill. U. L.Rev. 41, 50 ("True to its name, the Model Penal Code serves as the model for our present procedures of capital sentencing.").

[22] California's statute, like the Model Penal Code provision, requires that "aggravating" and "mitigating" factors be weighed against each other to arrive at the sentencing decision. Cal. Pen. Code, § 190.3; Covey, *supra*, 31 Hastings Const. L.Q. at p. 222. Several of the sentencing factors are also phrased similarly to the Model Penal Code provisions. Compare Model Pen. Code, § 210.6(4)(b)-(g) (withdrawn 2009) with

rendering the defendant eligible for the death penalty, "a further hearing was held – the penalty phase – at which a wide range of evidence in 'aggravation' or 'mitigation' could be introduced, including the nature and circumstances of the offense, prior criminal activity by the defendant involving force or violence, and 'the defendant's character, background, history, mental condition and physical condition.'"[23]

California again presaged a national trend by almost immediately broadening the scope of its death penalty. In 1978, voters passed another proposition, known as the Briggs Initiative, which "was intended to 'give Californians the toughest death-penalty law in the country,'" one that would "apply to every murderer."[24] The initiative "more than doubled the number of special circumstances" in the statute, greatly expanding death eligibility in California.[25] The Briggs Initiative ushered in a long period of tough-on-crime policies that would expand the death penalty and increase the length of noncapital sentences.[26] After 1978, California continued to expand the number of special circumstances that determine eligibility for the death penalty.[27] Other states did the same,[28] but California's statute is exceptionally broad:

Cal. Pen. Code, § 190.3, factors (d), (e), (f), (j), (g) & (h). Unlike the Model Penal Code, however, section 190.3 does not designate the sentencing factors as either aggravating or mitigating, a feature that has generated confusion. Compare Model Pen. Code, § 210.6(3) & (4) with Cal. Pen. Code, § 190.3.

[23] *People v. Green* (1980) 27 Cal.3d 1, 49 n. 34 (describing former Cal. Pen. Code, § 190.3), abrogated by *People v. Martinez* (1999) 20 Cal.4th 225.

[24] Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1310 & n. 154, quoting State of California, Voter's Pamphlet 34 (1978).

[25] *Id.* at pp.1312-1313.

[26] See Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (2007) pp. 62, 157-158.

[27] Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at pp. 1314-1315 (describing expansion of death eligibility after Briggs Initiative); Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2019) 66 UCLA L.Rev. 1394, 1406 (describing expansion of special circumstances by the legislature and by initiative in the mid-1990s to 2000).

[28] Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes* (2011) 46 Harv. C.R.-C.L. L.Rev. 223; Simon & Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties* in The Killing State: Capital Punishment in Law, Politics, and Culture (Austin Sarat 1999) pp. 81-83.

Studies have found that as many as "95 percent of all first-degree murder convictions" are eligible for a death sentence under the 2008 California statute.[29]

The modern death penalty envisioned in *Gregg* – a narrowly targeted law that would result in only the "worst of the worst" being sentenced to death – did not materialize.[30] While the Supreme Court set some constitutional guidelines – requiring mitigating evidence, excluding some categories of offenders (juveniles and the intellectually disabled) – it largely abdicated constitutional oversight of other issues, including race discrimination.[31]

Most of all, because so many states, like California, expanded their death penalty statutes, giving prosecutors broad discretion whether to pursue a death sentence in any given case, the arbitrariness that *Furman* identified as the death penalty's fatal constitutional flaw is as bad or worse now than when *Furman* was decided.[32]

As Justice Breyer observed, the experience of the last forty years has only made it "increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."[33]

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[29] Grosso et al., *supra*, 66 UCLA L.Rev. at p.1409; see also CCFAJ Report, *supra*, at p. 120 ("Under the death penalty statute now in effect, 87% of California's first degree murders are 'death eligible' and could be prosecuted as death cases,"citing Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1331).

[30] *Gregg v. Georgia, supra*, 428 U.S. at pp. 206-207 (plur. opn. of Stewart J.); *Kansas v. Marsh* (2006) 548 U.S. 163, 206 (dis. opn. of Souter, J.) ("within the category of capital crimes, the death penalty must be reserved for 'the worst of the worst'"); Note, *supra,* 46 Harv. C.R.-C.L. L.Rev. at p. 230 ("*Gregg* envisioned a death penalty scheme in which aggravating factors genuinely narrowed the scope of jurors' discretion to a smaller, more culpable subset of offenders for whom death sentences would be more consistently imposed.").

[31] Steiker and Steiker, Courting Death (2016) pp. 78-115 (discussing the Supreme Court's "failure to address forthrightly the death penalty's racialized history") (hereafter Courting Death); *id.* at pp. 154-192 (discussing failures of constitutional regulation of the death penalty generally, including the "missed opportunity" of *McCleskey v. Kemp* (1987) 481 U.S. 279).

[32] Courting Death, *supra*, at pp. 151-153.

[33] *Glossip v. Gross, supra,* 576 U.S. at p. 917 (dis. opn. of Breyer, J.), quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.

The persistence of these problems led the American Law Institute itself to conclude in 2009 that the effort to regulate capital punishment was an abject failure. The Institute withdrew its model code provisions on the death penalty.[34] The breadth of capital sentencing statutes and the corresponding discretion accorded to actors administering them creates a medium where "arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race)" continue to determine who is sentenced to death.[35]

As discussed below, California's death penalty law suffers from all these flaws:

- It is applied in a racially discriminatory manner;
- A handful of counties impose the vast majority of death sentences, without regard to underlying crime rates;
- The death penalty is not imposed on the worst of the worst but disproportionately on young offenders, especially youth of color, on people who are seriously mentally ill or intellectually disabled, on people who have suffered extreme childhood trauma, and even on those who are innocent;
- The arbitrary application of the law is exacerbated by
    - the uneven quality of indigent defense, and
    - the failure to limit the prosecution to one penalty trial;
- Taxpayers pay billions to defend death judgments that are most often reversed after decades of litigation; and
- The system is characterized by delay and dysfunction because there are simply not enough lawyers to represent the hundreds of people who have been sentenced to death – a problem made worse by the passage of Proposition 66.

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[34] Liptak, *Group Gives Up Death Penalty Work*, N.Y. Times (Jan. 4, 2009) <https://www.nytimes.com/2010/01/05/us/05bar.html> (as of Feb. 22, 2021); *Leading Law Group Withdraws Model Death Penalty Laws Because System is Unfixable*, Death Penalty Information Center (Oct. 26, 2009) <https://deathpenaltyinfo.org/news/leading-law-group-withdraws-model-death-penalty-laws-because-system-is-unfixable> (as of Feb. 4, 2021). The authors of the report that led to the repeal stressed that while the constitutionality of the death penalty was premised on narrowing the scope of its application, "the scope of most capital statutes remains extraordinarily broad." Steiker & Steiker, ALI Report, *supra*, 89 Tex. L.Rev. at p. 379.

[35] Steiker & Steiker, ALI Report, *supra*, 89 Tex. L.Rev. at p. 369; see also *Glossip, supra*, 576 U.S. at pp. 917-919 (dis. opn. of Breyer, J.).

II. CALIFORNIA'S DEATH PENALTY STATUTE IS APPLIED IN A RACIALLY DISCRIMINATORY MANNER.

As the California legislature recently acknowledged, it is a stark reality that "racism . . . pervades the criminal justice system."[36] California's death penalty system is no exception. A robust body of empirical evidence demonstrates that California's death penalty statute is applied in a disparate manner based on race.

The racial disparities that permeate California's death penalty are the predictable result of a system that is vulnerable to racial bias at nearly every stage. The overbreadth of California's statute gives prosecutors vast discretion to decide who will be charged with death-eligible homicides; jury selection procedures systematically produce whiter, more racially biased juries; and the statute's poorly defined aggravating and mitigating factors encourage jurors to resort to racial stereotypes in deciding who lives and who dies.

A. Racism Permeates California's Death Penalty System

The overwhelming majority of studies that have analyzed the death penalty in the United States have found that racial disparities are pervasive, and that the race of the victim and race of the defendant impact whether the death penalty will be imposed.[37] In particular, Black defendants who kill White victims are more likely to

[36] Assem. Bill. No. 2542 (2019-2020 Reg. Sess.) §2(h).

[37] See, e.g., U.S. Gen. Acct. Off., GAO/GGD 90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, pp. 1-2, 5 (1990) (conducting an "evaluation synthesis" of the published research on race and the death penalty, and finding, consistently, that the race of the victim influenced the likelihood of capital charging and sentencing).

be sentenced to death than those who kill Black victims.[38] These findings have been exhaustively replicated in both the state[39] and federal systems.[40]

This evidence of discriminatory application is partially responsible for the death penalty "fall[ing] out of favor in most of the country. . . ."[41] Indeed, a group of nearly 100 current and former elected prosecutors, Attorneys General, law enforcement leaders, former United States Attorneys, and Department of Justice officials, including the District Attorneys of Contra Costa, San Francisco, Santa Clara, and Los Angeles Counties, recently issued a statement opposing the federal death penalty and calling for clemency for those scheduled for federal execution in part because "[r]ace . . . plays a deeply disturbing and unacceptable role in the application of the death penalty."[42]

California is not immune to the invidious influence of racial bias in its application of the death penalty. There are substantial disparities in sentencing in California based on both the race of the victim and the race of the defendant.

Race of victim. In the only statewide study of the effect of race in California capital cases from start to finish, social scientists Glenn Pierce and Michael Radelet found that cases with White victims were much more likely to end in a death sentence

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[38] See Am. Bar Assoc., ABA Death Penalty Due Process Review Project, The State of the Modern Death Penalty in America: Key Findings of State Death Penalty Assessments (2006-2013) (Nov. 2013) p. 8.

[39] See, e.g., DPIC, Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty (Sep. 2020) pp. 30-34 (summarizing the consistent findings of studies in "multiple jurisdictions over a broad range of years . . . [and] accounting for hundreds of confounding variables" that conclude that the race of the victim affects whether a defendant is charged with a capital crime or sentenced to death).

[40] See, e.g., U.S. Dept. of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000) (2000) at p. 6 (finding that U.S. Attorneys were almost twice as likely to recommend seeking the death penalty for a Black defendant when the victim was not Black as when the victim was Black).

[41] Fair Punishment Project, Too Broken to Fix: Part I: An In-depth Look at America's Outlier Death Penalty Counties (2016) p. 3 (hereafter FPP I).

[42] Fair and Just Prosecution, Joint Statement By Criminal Justice and Law Enforcement Leaders in Opposition to Application of the Federal Death Penalty (Dec. 2020) p. 1 < https://fairandjustprosecution.org/wp-content/uploads/2020/12/FJP-Federal-Death-Penalty-Joint-Statement.pdf> (as of Feb. 22, 2021), citing ACLU, Race and the Death Penalty <https://www.aclu.org/other/race-and-death-penalty> (as of Feb. 22, 2021).

than cases with Black and Latinx victims.[43] Overall, people charged with killing White victims were more than three times as likely to receive a death sentence as were killers of Black victims and more than four times as likely as were killers of Latinx victims.[44] Even after controlling for geography and the heinousness of the crimes, killers of Black victims were 59.3 percent less likely to receive the death penalty as were killers of White victims, and killers of Latinx victims were 67.1 percent less likely to receive a death sentence.[45]

Pierce and Radelet's statewide findings are consistent with findings from individual California counties. In the largest and most comprehensive single-county study of the effects of race on application of the death penalty, researchers found that in San Diego County "a substantial factor in prosecutors' decision whether to charge special circumstances and in the District Attorney's decision whether to seek the death penalty was the race/ethnicity of the victims and defendants."[46] Even after controlling for a variety of variables, the study showed that the odds of the District Attorney seeking a death sentence were over seven times as high in cases with a Latinx defendant and a White victim and over six and a half times as high in cases with a Black defendant and a White victim as in cases with a Black or Latinx victim.[47] Studies from other large counties in California have found similar effects related to

[43] See Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999* (2005) 46 Santa Clara L.Rev. 1, 19-20.

[44] *Id.* at pp. 19, 21-22.

[45] *Id.* at p. 34.

[46] Shatz et al., *Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion* (2020) 51 Colum. Hum. Rts. L.Rev. 1070, 1096.

[47] *Id.* at p. 1095.

the race of the victim,[48] and unadjusted data from other California counties also show substantial disparities based on the race of the victim.[49]

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[48] See, e.g., Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion* (2016) 7(1) Race & Justice 7, 23 (finding, after controlling for a wide variety of relevant factors, that in Los Angeles County "defendants accused of killing White victims are more likely to be charged with a death-eligible offense than those accused of killing minority victims"); Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multistage Analysis of Pretrial Disparities* (2020) 45 Crim. Justice Rev. 225, 239 (determining, after controlling for a host of variables, that in Los Angeles County, cases with minority victims were treated more leniently compared to cases with White victims, and that cases with White victims and minority defendants were treated more punitively than cases with White defendants); Rohrlich & Tulsky, *Not All L.A. Murder Cases Are Equal,* L.A. Times (Dec. 3, 1996) (examining 9,442 willful homicides in Los Angeles County and finding that while 15 percent of White victim cases were charged capitally, only 7 percent of Black victim and 6 percent of Latinx victim cases, respectively, were similarly charged); Weiss et al., *Death Penalty Charging in Los Angeles County: An Illustrative Data Analysis Using Skeptical Priors* (1998) 28 Soc. Methods & Research 91, 114 (finding that, in Los Angeles County, defendants who killed White or Asian victims were more likely to be charged with a special circumstance and that Black defendants were more likely to be charged with special circumstances than other defendants, unless the victim was Black); Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California* (2007) 35 J. Crim. Justice 17, 21 (finding that after controlling for other variables, in San Joaquin County the likelihood of being charged with a special circumstance "for defendants in African American victim cases was one-fifth the likelihood for defendants in White . . .victim cases" and in Latinx victim cases the odds were one-twentieth those of cases with White victims); Shatz & Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single Case Study* (2013) 34 Cardozo L.Rev. 1227, 1229-1230 (finding "statistically significant geographic disparities in the administration of the death penalty in the two halves of Alameda County . . .which correlate with racial differences in the population makeup of the county"); Weiss et al., *Assessing the Capriciousness of Death Penalty Charging* (1996) 30 Law & Soc'y Rev. 607, 619 (finding that in San Francisco County "there is some evidence . . .that if the victim is white or Asian (compared to African American or Latino), the odds of a capital charge are about four times larger").

[49] In Riverside County, an expert declaration submitted by a capital defendant indicated that from 1992-1994, 81 percent of the capital prosecutions there involved White victims, although Whites were only 39 percent of the willful homicide victims during that period. (*People v. Montes* (2014) 58 Cal.4th 809, 827-828.) In Fresno County, a defendant presented a study showing that *all* of Fresno's sentences of death and life without parole at that point had been issued in cases with White victims, although only

Race of Defendant. Death sentences in California are also disproportionately imposed on Black and Latinx defendants. The raw numbers are stark. As of July 1, 2020, over a third of the state's death row was Black,[50] while only 6.5 percent of the state's population is Black.[51] The overrepresentation of Latinx defendants in recent years is similarly disturbing. In the last three years (2018-2020), 85 percent of people sentenced to death in California were Latinx,[52] while Latinx people comprise just 39.4 percent of the state population and fewer than half of homicide arrests from 2005 to 2019.[53]

The racial disparities in death sentences are also apparent in individual counties. California is home to five "outlier" counties that continue to impose death sentences at high rates while "the vast majority" of the country has abandoned capital punishment.[54] Kern, Los Angeles, Orange, Riverside, and San Bernardino Counties are among the just 16 of 3,143 counties or county equivalents in the United States that imposed five or more death sentences between 2010 and 2015.[55] Death sentences from those counties are disproportionately meted out against Black and Latinx defendants:

For example, over 70 percent of the people Los Angeles County has sentenced to death in the modern era are Black or Latinx.[56] During the tenure of former Los

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a third of all willful homicides in that county involved White victims. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1170.) In Kern County, 50 percent of the victims in death penalty cases from 2010-2015 were White while just 20 percent of homicide victims in the state in that time period were White. (FPP I, *supra*, at p. 40.)

[50] NAACP Legal Def. & Educ. Fund, Inc., Death Row USA 36 (2020).

[51] U.S. Census Bureau, Quick Facts California (2019) <https://www.census.gov/quickfacts/CA> (as of Feb. 22, 2021).

[52] Cal. Dept. of Justice, Homicide in California (2019) p. 2; Cal. Dept. of Justice, Homicide in California (2018) p. 2; DPIC, 2020 Death Sentences by Name, Race, County, and Year <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/2020-death-sentences-by-name-race-county-and-year> (as of Mar. 11, 2018).

[53] Cal. Dept. of Justice, Homicide in California (2014) p. 36 (showing homicide arrests by race from 2005 to 2014); Cal. Dept. of Justice, Homicide in California (2019) p. 38 (showing the same data from 2010 to 2019).

[54] Fair Punishment Project, Too Broken to Fix Part II: An In-depth Look at America's Outlier Death Penalty Counties (2016) p. 2-3 (hereafter FPP II).

[55] *Ibid.*

[56] Data maintained by HCRC, on file with OSPD.

Angeles District Attorney Jackie Lacey from 2012 to 2019, none of the 22 individuals sentenced to death in Los Angeles was White.[57]

In Orange County, 89 percent of the defendants sentenced to death between 2010 and 2015 were nonwhite. Forty-four percent of those sentenced to death were Black, although only two percent of the county's population was Black.[58]

San Bernardino County produced 14 death sentences between 2006-2015; 43 percent of the defendants were Black. Less than 10 percent of the county's population was Black.[59]

In Riverside County, 76 percent of defendants sentenced to death between 2010 and 2015 were people of color and 24 percent of those sentenced to death were Black, though Black people made up just seven percent of the county's population.[60]

In Kern County, 17 percent of defendants sentenced to death between 2010 and 2015 were Black although just six percent of the county's population is Black.[61]

Even if these profound disparities in the raw numbers could somehow be accounted for by non-racial factors, as one researcher has observed:

> Many consider it insensitive and unseemly, if not immoral, for a country with our historical record on slavery and racial discrimination to persist in using a punishment that whites almost exclusively administer and control, that serves no demonstrated penological function, and has a profound adverse impact – physically, psychologically, and symbolically – on its black citizens.[62]

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[57] ACLU, The California Death Penalty Is Discriminatory, Unfair, and Officially Suspended: So Why Does Los Angeles District Attorney Jackie Lacey Seek to Use It, at p. 2 <https://www.aclu.org/sites/default/files/field_document/061819-dp-whitepaper.pdf > (as of Feb. 22, 2021); see also FPP II, *supra*, at p. 32.

[58] FPP II, *supra*, at p. 43.

[59] FPP II, *supra*, at pp. 18-19.

[60] FPP I, *supra*, at p. 35.

[61] FPP I, *supra*, at p. 40.

[62] Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia* (1998) 83 Cornell L.Rev. 1638, 1651.

B. California's System is Vulnerable to Racial Bias

These racially disparate outcomes are an unsurprising result of a capital punishment system vulnerable to racial bias at nearly every stage. Among other things, California's death penalty scheme affords unusually broad discretion to prosecutors in deciding whether to charge the death penalty, systematically selects whiter and more racially biased juries, and relies on poorly written instructions that fail to clearly define aggravating and mitigating factors.

Overbroad statute and prosecutorial discretion. Studies have shown that "the narrower the category of those eligible for the death penalty, the less the risk of error, and the lower the rate of racial or geographic variation."[63] California's broad definition of special circumstances, by contrast, grants prosecutors extraordinary discretion to decide whether a homicide will be prosecuted as a capital case. California's death penalty statute separately enumerates 22 "special circumstances" that may make a first-degree murder eligible for the death penalty.[64] As noted above, as many as "95 percent of all first-degree murder convictions" in California under the 2008 statute "were death eligible."[65]

The discretion granted to prosecutors by California's broad statute is coupled with a lack of uniform criteria for determining whether to seek death. In 2008, the Commission attempted to determine how prosecutors in California's 58 counties decided when to charge a case capitally. Of the few counties that cooperated with the Commission's efforts, very few had any written policies or guidelines; only one was willing to provide a copy of its written policy for seeking death.[66] Data the Commission was able to cull from other sources, however, raised important concerns. Among other things, it "demonstrated great variation in the practices for charging special circumstances . . . ."[67]

Indeed, the unbridled discretion of prosecutors may partly explain the dramatic disparities based on the race of the defendant in the application of some of the broadest and most common special circumstances. The relatively recently added

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[63] CCFAJ Report, *supra*, at p. 138, citing Liebman & Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty* (2006) 74 Fordham L.Rev. 1607.

[64] Cal. Pen. Code, § 190.2.

[65] Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility* (2019) 16(4) J. Emp. Legal Studies 693, 693.

[66] CCFAJ Report, *supra*, at pp. 152-53.

[67] *Id.* at p. 155.

gang-murder special circumstance was the most disparately applied: Latinx defendants were 7.8 times more likely than other similarly situated defendants to be found to have that special circumstance present and Black defendants were 4.8 times more likely.[68]

The Commission also expressed concern about the "lack of racial diversity among the individuals who [make] the decision" whether to bring capital charges.[69] This concern was well-founded. A 2015 study documenting the race of prosecutors in 52 of California's 58 counties found that 85 percent of District Attorneys and 70 percent of deputy district attorneys were White, compared to less than 40 percent of the state's population.[70] The exceedingly broad discretion afforded by California's statute is thus wielded by a disproportionately White class of prosecutors.

Capital jury selection process. California juries also do not fully reflect the racial and ethnic diversity of the state,[71] and they are even less representative in capital cases. In most counties, the rolls from which prospective jurors are summoned are not representative of the population.[72] The process of "death qualification"[73] in

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[68] Grosso et al., *supra*, 66 UCLA L.Rev. at pp. 1435-1436 (finding further that Black and Latinx defendants together faced odds 3.5 times higher of having the drive-by shooting circumstance found to be present, and Latinx defendants also faced higher odds (1.6 times) of lying-in-wait special circumstance being found; and, as to the robbery or burglary murder special circumstances, Black defendants faced odds that were 2.2 times higher that robbery or burglary special circumstances would be found than those faced by similar nonblack defendants).

[69] CCFAJ Report, *supra*, at p. 155.

[70] Bies et al., Stuck in the '70's: The Demographics of California Prosecutors (2015), pp. 7-8, 10, 12. < https://law.stanford.edu/wp-content/uploads/2015/08/Stuck-in-the-70s-Final-Report.pdf > (as of Feb. 22, 2021).

[71] According to 2019 U.S. Census estimates, California's population is: 39.4 percent Hispanic or Latinx, 36.5 percent non-Hispanic White, 15.5 percent Asian, 6.5 percent Black, and 4 percent mixed race <https://www.census.gov/quickfacts/fact/table/CA/RHI725219)> (as of Feb. 22, 2021).

[72] See Berkeley Law Death Penalty Clinic, Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (2020) pp. 3-5 (hereafter Whitewashing the Jury Box) (eligible African Americans substantially underrepresented on jury rolls).

[73] In capital cases, the prosecution is permitted to question jurors "about their attitudes toward the death penalty, and if those attitudes are so strong as to 'prevent or substantially impair' a potential juror from following the law and from considering all of

capital cases, and the use of peremptory challenges, serve to further "whitewash the jury box," resulting in whiter, more racially biased jury panels.[74]

Black Americans have consistently opposed capital punishment in greater percentages than White Americans. Surveys beginning in the 1970s have repeatedly found that approximately 70 percent of White people but only 40 percent of Black people support the death penalty.[75] It is thus unsurprising that death qualification disproportionately removes Black jurors from jury pools.[76]

Moreover, the whiter pool of potential jurors that remains after death qualification is more likely to be racially biased. Empirical research has demonstrated that racial animus is "one of the most consistent and robust predictors of support for the death penalty . . . ."[77] Death-qualified jurors hold both more implicit and explicit racial biases than those who are excludable due to their opposition to the death penalty.[78]

After a jury is death-qualified, the prosecution's use of peremptory challenges tends further to reduce the number of Black jurors. Studies of both capital and non-

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the sentencing options in the case (including imposition of the death penalty), they are excluded from serving." Lynch and Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors* (2018) 40 Law & Pol'y 148, 148 (hereafter Death Qualification), citing *Morgan v. Illinois* (1992) 504 U.S. 719, 738; *Wainwright v. Witt* (1985) 469 U.S. 412, 424.

[74] Whitewashing the Jury Box, *supra*, at pp. 40-41.

[75] Unnever et al., *Race, Racism, and Support for Capital Punishment* (2008) 37 Crime & Justice 45, 54.

[76] Death Qualification, *supra*, at pp.148, 153, 157-159 (citing earlier studies finding that death-qualified jurors are more likely to be White and male, and reporting results of a study using surveys from 2014 and 2016 in Solano County that found that death-qualification is likely to remove more than half of Black jurors from the jury pool due to their opposition to the death penalty).

[77] Unnever et al., *supra*, at p. 66; see also Lynch & Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury* (2011) Mich. St. L.Rev. 573, 589 (hereafter Looking Across the Empathic Divide), citing Hurwitz & Peffley, *And Justice for Some: Race, Crime, and Punishment in the US Criminal Justice System* (2010) 43 Can. J. Pol. Sci. 457, 470 (study found that when White respondents were informed that the death penalty was racially discriminatory, support for it increased, rather than decreased).

[78] Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States* (2014) 89 NYU L.Rev. 513, 559.

capital trials have shown that prosecutors are significantly more likely to use peremptory challenges to exclude Black jurors than White jurors.[79] Jurors of color who survive death qualification but have some reservations or ambivalence about the death penalty may still be excused via peremptory challenge.[80] Their qualms can be proffered as a race-neutral justification for removal, thereby insulating the prosecutor from a successful challenge under *Batson v. Kentucky* (1986) 476 U.S. 79.[81] Thus, "[w]hen they operate in tandem, the process of death qualification and the targeted use of peremptory challenges to eliminate potential jurors with reservations about the death penalty greatly increase the odds that capital juries will be disproportionately (if not entirely) white."[82]

Incomprehensible jury instructions. California's confusing jury instructions compound the racial bias in capital juries. Penalty phase jury instructions "are notoriously difficult for jurors to understand and apply," increasing "the likelihood that [jurors'] judgments will be shaped by pre-existing biases."[83] Researchers Craig Haney and Mona Lynch have repeatedly found that most jurors have low comprehension of California penalty phase instructions.[84] Studies with

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[79] See *People v. Harris* (2013) 57 Cal.4th 805, 887-889 (conc. opn. of Liu, J.) and studies cited; Whitewashing the Jury Box, *supra*, at pp. 13-14.

[80] Death Qualificatio*n, supra,* at p. 166.

[81] In *Batson*, the Supreme Court established a three-step procedure to determine if the prosecution is discriminating in its exercise of peremptory challenges: if the defendant establishes a prima facie case that the prosecutor is striking prospective jurors based on their race, the prosecutor must offer a race-neutral reason for the strikes, and the judge must then decide if the prosecutor engaged in purposeful discrimination. 476 U.S. at pp. 96-98; see also Whitewashing the Jury Box, *supra*, at pp. 7-8.

[82] Death Qualification, *supra*, at p. 166.

[83] Lynch & Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 Law & Soc. Rev. 69, 74; see also Lynch & Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* (2000) 24 Law & Hum. Behav. 337, 339.

[84] Lynch & Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination* (2009) 33 Law & Hum. Behav. 481, 482 (hereafter Capital Jury Deliberation) (describing prior studies documenting "widespread instructional incomprehension of capital penalty phase instructions . . . in California"); see also Lynch & Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* (2000) 24 Law & Hum. Behav. 337, 346-

mock jurors using California's penalty phase instructions on aggravating and mitigating factors showed that low-comprehension jurors were more likely to sentence Black defendants to death, while comprehension did not influence the rate of death-sentencing for White defendants.[85]

The predictable result of the removal of non-White jurors and the use of difficult to comprehend jury instructions is greater racial discrimination in capital sentencing. In a study with mock jurors who were death-qualified and using California's jury instructions, 77 percent of the juries shown videos with a Black defendant either unanimously voted for or favored a death sentence, while only 62 percent of the juries shown otherwise identical videos with a White defendant voted similarly.[86] This difference was even greater when juries viewed cross-racial videos: "79% of the 24 juries who viewed the Black defendant/White victim trial tape . . . leaned toward or unanimously voted for death, but only 56% of the 23 juries in the White defendant/Black victim condition . . . favored death."[87] The proportion of Whites on a jury was a "significant predictor of death verdicts," with more death verdicts for Black defendants coming from juries with more White mock jurors on them.[88] This may be in part because, as another study of mock jurors showed, White jurors are "significantly more likely to improperly use mitigating evidence in favor of a death sentence for [a] Black defendant in comparison to [a] White defendant," a result that was "exacerbated by the jurors' lack of comprehension of the penalty phase instructions."[89]

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347 (hereafter Discrimination and Instructional Comprehension) (detailing study finding poor comprehension of California penalty phase jury instructions).

[85] Discrimination and Instructional Comprehension*, supra,* at pp. 347, 349, 354; Capital Jury Deliberation, *supra*, at pp. 489-490. Although California's jury instructions have since been revised, the revised instructions did little to mitigate the confusion. Specifically, both the new and the old instructions leave jurors in the dark as to which listed factors can be used as aggravation and which can only be mitigating. Compare CALJIC 8.85 and 8.88 with CALCRIM 763 and 766.

[86] See Capital Jury Deliberation, *supra*, at p. 485.

[87] *Ibid.*

[88] *Ibid.*

[89] Looking Across the Empathic Divide, *supra*, at pp. 583-584, citing Discrimination and Instructional Comprehension*, supra.*

C. The Available Remedies for These Racial Disparities Have Been Inadequate

The available means for remedying racial disparities in capital sentencing have proved to be inadequate.

Post-conviction review has been ineffective in rooting out racially biased capital sentencing. The California Supreme Court has been unwilling to use the appellate process to reshape the features of California's capital system that facilitate the introduction of bias or to provide relief to individual defendants whose sentences were likely impacted by race-based decision making.[90] While prosecutors' broad discretion contributes to racially discriminatory sentencing, the Court's jurisprudence makes it nearly impossible to prevail on a selective prosecution claim.[91] Despite the overwhelming evidence of racial bias in the use of peremptory challenges, the Court has almost never found a violation of *Batson*.[92] Although studies have repeatedly showed that California's confusing penalty phase instructions contribute to racially discriminatory decision making, the Court has routinely found the instructions adequate.[93] Finally, while intercase proportionality review – a comparison of cases in which the death penalty is imposed – might identify cases in which racial bias influenced the penalty verdict, the Court has held that such review is not required.[94]

Previous efforts to investigate and address the source of racial disparities have also been stymied. For its 2008 report, the Commission reviewed data on racial disparities in death sentencing in California.[95] Finding that more data was needed to

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[90] California Racial Justice Act (Stats. 2020, ch. 317, § 2(c).) ("More and more judges in California and across the country are recognizing that current law, as interpreted by the high courts, is insufficient to address discrimination in our justice system.").

[91] *People v. Montes*, *supra*, 58 Cal.4th at p. 828 (explaining that a discriminatory prosecution claim requires a showing of "*deliberate* invidious discrimination by prosecutorial authorities").

[92] *People v. Johnson* (2019) 8 Cal.5th 475, 528 (dis. opn. of Liu, J.) (observing that the California Supreme Court has not found *Batson* error involving removal of a Black juror in 30 years).

[93] See, e.g., *People v. Turner*, 2020 WL 7018926, *24.

[94] See, e.g., *People v. Sanders* (1990) 51 Cal.3d 471, 529.

[95] CCFAJ Report, *supra*, at pp. 149-152.

determine the causes of racial disparity before recommendations could be made, the Commission called for more study and analysis of "racial variation":

> Evidence of disparities in the administration of the death penalty undermines public confidence in our criminal justice system generally. California is the most diverse state in the country. It is our duty to ensure that every aspect of the criminal justice system is administered fairly and evenly, and that all residents of the state are accorded equal treatment under the law. This is especially true when the state chooses to take a life in the name of the people.[96]

The Commission acknowledged that California District Attorneys had largely failed to cooperate with its efforts to determine the process by which the decision is made to seek a death sentence in a homicide prosecution.[97] It recommended that the Legislature require "courts, prosecutors and defense counsel to collect and report all data needed to determine the extent to which the race of the defendant, the race of the victim, geographic location and other factors affect decisions to implement the death penalty . . . ."[98] In the twelve years since the report, this recommendation has not been implemented, and the manner in which district attorneys choose to pursue death sentences is no more transparent.

The recently adopted California Racial Justice Act of 2020 (RJA) is intended to "eliminate racially discriminatory practices in the criminal justice system."[99] Some of its provisions may serve to reduce or ameliorate racial discrimination in the implementation of the death penalty. For example, it provides that if a court finds that the state has sought, obtained, or imposed a sentence "on the basis of race, ethnicity or national origin," in addition to any other remedies available under the act, the "defendant shall not be eligible for the death penalty."[100] The provisions of the RJA are, however, only prospective, and do not address racial discrimination in the convictions and sentences of the hundreds of individuals already on California's death row.

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[96] *Id.* at p. 152.

[97] *Ibid.*

[98] *Id.* at p. 154.

[99] Assem. Bill. No. 2542 (2019-2020 Reg. Sess.) §2(j).

[100] *Id.* at §§ 3(a), (e)(3).

III. CALIFORNIA'S DEATH PENALTY IS APPLIED ARBITRARILY BASED ON GEOGRAPHY

The overbreadth of California's statute and the broad discretion it affords prosecutors also permits drastically uneven and arbitrary imposition of death sentences across the state. Research shows that differences in death sentencing rates between counties is based not on comparative crime rates or the egregiousness of the cases but on factors such as the predilection of particular prosecutors, the racial composition of the county, or differences in defense resources.[101]

Only a handful of California's 58 counties account for the majority of death judgments imposed in the state. From 2015-2019, 44 death sentences were imposed state-wide, with only six counties accounting for 89 percent of those sentences.[102] Local decisions to pursue the death penalty impose tremendous costs that are borne by the state as a whole, including the cost of appeal, habeas, and confinement on death row.[103] Governor Newsom's executive order halting executions in 2019 cited the high cost, $5 billion since capital punishment's reinstatement in 1978, as an important factor in his decision.[104] As the ACLU observed in its 2009 report Death by Geography, "California's death penalty has become so arbitrary that the county border, not the facts of the case, determines who is sentenced to execution and who is simply sentenced to die in prison. Pursuing executions provides no identifiable benefit to these counties but costs millions."[105]

Geographic disparities have grown on the national level, even as support for the death penalty has diminished, and are now higher than in any other period in

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[101] *Glossip v. Gross, supra*, 576 U.S. at pp. 918-920 (dis. opn. of Breyer, J.) (collecting studies); see also ACLU of Northern California, Death by Geography: A County by County Analysis of the Road to Execution in California (Jan. 2009) pp. 4-6 (hereafter Death by Geography) (finding no correlation between county homicide rates and death sentencing rates). <https://www.aclunc.org/sites/default/files/death_by_geography.pdf> (as of Feb. 22, 2021). Underfunding of defense services is addressed in section V.A. below.

[102] Los Angeles, Riverside, Orange, Kern, San Bernardino, and Tulare Counties. HCRC Data on file with OSPD.

[103] CCFAJ Report, *supra*, at pp. 144-147.

[104] Governor's Exec. Order N-09-19 (Mar.13, 2019) <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf> (as of Feb. 22, 2021).

[105] Death by Geography, *supra*, at p. 7.

U.S. history since colonial times.[106] In 2015, Justice Breyer noted that "[b]etween 2004 and 2009 . . . just 29 counties (fewer than 1 percent of counties in the country) accounted for approximately half of all death sentences imposed nationwide."[107] According to the Death Penalty Information Center (DPIC), nearly one-third (31 percent) of the 39 new death sentences imposed in the United States in 2017 came from just three counties, Riverside, California; Clark, Nevada; and Maricopa, Arizona.[108] Geographic disparities within the state were cited as a reason for Colorado's recent abolition of the death penalty.[109]

Disparities within California are equally striking.[110] From 2010-2019, 143 death sentences were imposed in California (including 11 re-sentencings); 81 percent of those death sentences were imposed by just six counties: Los Angeles, Riverside, Orange, Kern, San Bernardino, and Alameda. 68 percent of those sentences were imposed by only *three* counties: Los Angeles, Riverside, and Orange.

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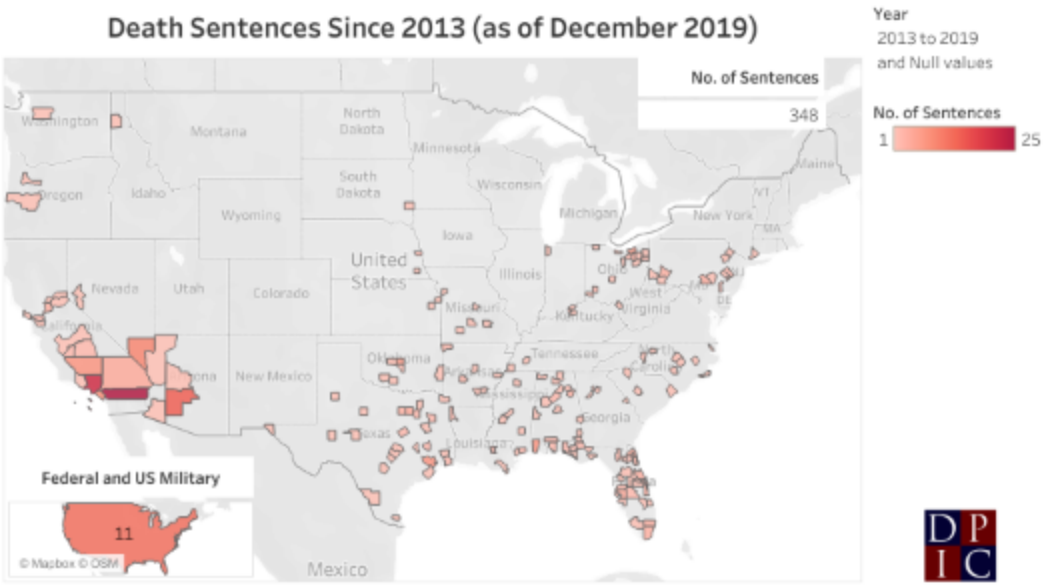
[106] Baumgartner et. al, *The Geographic Distribution of US Executions* (2016) 11 Duke J. Const. L. & Pub. Pol'y. 1, 2 <http://fbaum.unc.edu/articles/Duke-GeographyOfDeath-2016.pdf> (as of Feb. 22, 2021).

[107] *Glossip v. Gross, supra,* 576 U.S. at p. 918 (dis. opn. of Breyer, J.), citing Smith, *The Geography of the Death Penalty and its Ramifications* (2012) 92 B. U. L.Rev. 227, 231-232.

[108] DPIC, *DPIC Year End Report: New Death Sentences Demonstrate Increasing Geographic Isolation* (Dec. 15, 2017) <https://deathpenaltyinfo.org/news/dpic-year-end-report-new-death-sentences-demonstrate-increasing-geographic-isolation> (as of Feb. 22, 2021).

[109] Representative Adrienne Benavidez, a sponsor of the bill repealing the death penalty in Colorado, explained, "It's important that we end that I think it has been a very discriminatory practice, not just towards people of color, but people within geographic areas [of] the state." DPIC, *Colorado Becomes 22nd State to Abolish Death Penalty* (Mar. 24, 2020) <https://deathpenaltyinfo.org/news/colorado-becomes-22nd-state-to-abolish-death-penalty> (as of Feb. 22, 2021); see also ACLU of Colorado, Ending A Broken System: Colorado's Expensive, Ineffective and Unjust Death Penalty (Jan. 2020), citing Beardsley et al., *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century* (2014) 92 Denver U. L.Rev. 431 <https://aclu-co.org/wp-content/uploads/2020/01/DeathPenaltyWhitePaper_Finalv2.pdf >(as of Feb. 22, 2021).

[110] DPIC, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All* (2013) p. 12-13 (discussing California cases) <https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf> (as of Feb. 22, 2021).



Counties with the Most Death Sentences Since 2013

County	State	
Riverside	CA	25
Los Angeles	CA	21
Maricopa	AZ	14
Clark	NV	9
Orange	CA	8
Harris	TX	7
Kern	CA	7
Mobile	AL	7
Cuyahoga	OH	6

Riverside County has become "the nation's leading producer of death sentences."[111] In 2015 alone, Riverside County meted out eight new capital sentences.[112] This comprised more than half of California's total death judgments that year, and more than any other county in the country.[113] In fact, it was more than every other *state*, except for Florida (with nine) and California as a whole.[114] For reference, from 2015-2019, Riverside County accounted for about 6 percent of the state's population but imposed 37 percent of the state's death judgments (16).

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[111] FPP I, *supra*, at p. 31.

[112] *Ibid.*

[113] DPIC, *Outlier Counties: Riverside County, "The Buckle of a New Death Belt"* (Oct. 3, 2016) < https://deathpenaltyinfo.org/news/outlier-counties-riverside-county-the-buckle-of-a-new-death-belt> (as of Feb 22, 2021).

[114] *Ibid.*

Prosecutors in Riverside and a handful of counties have continued aggressively to pursue death sentences despite the moratorium.[115] In 2020, three of the five death verdicts statewide were from Riverside County.[116] Despite the pandemic, dozens of capital cases are currently pending in California trial courts, most of them in Riverside County.[117] Although the decision to seek death is local, the ultimate costs of the death penalty are not. Until the death penalty is abolished, the panoply of post-conviction litigation continues, with the costs borne by *all* of California's taxpayers, not just by the counties where death sentences are imposed.[118]

IV. CALIFORNIA'S DEATH PENALTY IS NOT IMPOSED ON THE WORST OF THE WORST

As discussed above, California's death penalty law invites bias and arbitrary application at every step: the pool of death eligible defendants is extraordinarily broad, and prosecutors have unfettered discretion to decide which of these defendants to charge with death; the death qualification process allows prosecutors to select jurors who are more punitive and more racially biased than ordinary criminal jurors; and these jurors are charged with applying the flawed and confusing language of

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[115] See Damien, *The Death Penalty Question: Riverside County And Gov. Newsom's Execution Moratorium*, The Palm Springs Desert Sun (Mar. 1, 2020) (Riverside DA says moratorium "has zero effect on my decision to seek the death penalty") <https://www.desertsun.com/story/news/crime_courts/2020/03/02/death-penalty-question-riverside-county-and-gov-newsoms-execution-moratorium-california/2850096001/> (as of Feb. 22, 2021); Schubert et al., *California Gov. Gavin Newsom's Death Penalty Moratorium Is A Disgrace*, CNN (Apr. 23, 2019) (DAs of Sacramento, Riverside, Fresno, and Imperial Counties condemn moratorium) < https://www.cnn.com/2019/04/23/opinions/newsom-california-district-attorneys/index.html> (as of Feb. 22, 2021); Bollag, *Gavin Newsom's Death Penalty Moratorium Isn't Saving California Money,* The Sacramento Bee (July 23, 2019) (noting prosecutors are continuing to pursue death sentences despite moratorium) < https://www.sacbee.com/news/politics-government/capitol-alert/article232894822.html> (as of Feb. 22, 2021).

[116] DPIC, The Death Penalty in 2020: Year End Report, Death Penalty Hits Historic Lows Despite Federal Execution Spree, Pandemic, Racial Justice Movement Fuel Continuing Death Penalty Decline (Dec. 16, 2020) < https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report> (as of Feb. 22, 2021).

[117] Data on file with OSPD.

[118] The 2% Death Penalty, supra.

California's sentencing law to decide who among the targeted defendants will live or die.

Not surprisingly, a death penalty statute administered in this manner does not single out the worst of the worst for the ultimate punishment. To the contrary, as Governor Newsom stated in his executive order, the punishment too often falls on the young, especially youth of color, on the mentally ill and intellectually disabled, and on those raised in abusive environments and extreme poverty.

A. California Sentences More Young People, Especially Young People of Color, to Death than Any Other State

In the last 15 years, scientific research has transformed our understanding of the culpability of young offenders – those 25 or younger at the time of their offense. But while California's legislature has sought to ameliorate harsh sentences for many youthful offenders in the state, nearly 40 percent of the people sentenced to death in California were 25 or under at the time of their crime, and a disproportionate share of them were youth of color. Moreover, California prosecutors have continued to seek the death penalty against people who were only 18 at the time of their offense.

The Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551, set a bright-line minimum age of 18 for imposition of the death penalty and subsequently extended its rationale to also prohibit life without parole sentences for individuals who were under 18 at the time of their crimes.[119] These decisions were based on research demonstrating that those under 18 have (1) a lack of maturity and an underdeveloped sense of responsibility; (2) an increased susceptibility to negative influences and outside pressures; and (3) an unformed or underdeveloped character that is capable of change.[120] "These differences," the Court held, "render suspect any conclusion that a juvenile falls among the worst offenders."[121]

In the 15 years since *Roper* was decided, it has become clear that this reasoning applies to emerging adults as well. Research shows that brain development does not stop at 18 but continues to the mid-twenties. Late adolescents and emerging adults, 18 to 25 years old, are characterized by impulsivity, a propensity for engaging in risky behavior, diminished ability to evaluate situations before acting, and an over

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[119] *Ibid.; Miller v. Alabama* (2012) 567 U.S. 460, 489 (prohibiting life without parole sentences for children convicted of homicide).

[120] *Roper*, *supra*, 543 U.S. at pp. 569-570.

[121] *Id.* at p. 570.

emphasis on the pursuit of potential rewards and arousing activities.[122] These deficits are exacerbated when decisions are made in the kind of emotionally arousing situations common in crimes – those that involve negative emotions, such as fear, threat, anger, or anxiety.[123] The peak age of risky decision-making is not for children under the age of 18, but for late adolescents between the ages of 19 and 21.[124] Older adolescents are also more vulnerable to coercive pressure and the influence of peers.[125]

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[122] House of Commons Justice Committee, The Treatment of Young Adults in the Criminal Justice System, Seventh Report of Session 2016-17 <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> (as of Feb. 12, 2021); Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking* (2008) 28 Developmental Rev. 78, 79, 83; Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants* (2003) 27(4) Law & Hum. Behav. 333, 357; Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency* (2008) 32 Law & Hum. Behav. 78, 79, 85; Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking* (2017) 23(4) Psychology, Public Policy, and Law 410, 413-414; Casey et al., *The Adolescent Brain* (2008) 1124(1) Ann. N.Y. Acad. of Sci.the N.Y. Academy of Sciences 111, 121-122; Steinberg et al., *Age Differences in Future Orientation and Delay Discounting* (2009) 80 Child Development 28, 39; Steinberg et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report Evidence for a Dual Systems Model* (2008) 44 Developmental Psychology 1764, 1774-1776.

[123] Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts* (2016) 27(4) Psychological Science 549, 559-560.

[124] Braams et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior* (2015) 35 J. of Neuroscience 7226, 7235 (Figure 7); Shulman & Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment* (2014) 50 Developmental Psychology 167, 172-173.

[125] Albert & Steinberg, *Judgment and Decision Making in Adolescence* (2011) 21 J. of Research on Adolescence 211, 218-219; O'Brien et al., *Adolescents Prefer More Immediate Rewards When in the Presence of Their Peers* (2011) 21 J. of Research on Adolescence 747, 747, 751; Smith et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known* (2014) 50 Developmental Psychology 1564, 1564; Steinberg, *supra*, 28(1) Developmental Review at p. 83, 91; see *Miller*, *supra*, 567 U.S. at p. 472, fn. 5; Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI* (2010) 329(5997) Science 1358, 1358-1359; see also Michaels, *A Decent Proposal: Exempting Eighteen-To Twenty-Year-Olds From the Death Penalty*

The high court also recognized that juveniles have a greater capacity for change and thus for rehabilitation.[126] Like 16 and 17-year-olds, late adolescents and emerging adults between the ages of 18 and 25 have a great capacity for behavioral change and most will not continue to commit crime into adulthood.[127]

The Court further recognized that subjecting children to the death penalty would create an intolerable risk of unreliability because their immaturity inhibits their ability to engage with law enforcement, understand and decide whether to waive rights, and assist counsel.[128] Finally, the Court was concerned that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[129] Thus, a categorical exemption based on age was necessary.

All the considerations that animated *Roper, Miller*, and *Graham* apply to late adolescents and emerging adults from 18 to the early to mid-20s. The California legislature has recognized this in the noncapital context, finding that development of the brain region that is "very important for complex behavioral performance" is not complete until the mid-twenties.[130] California requires that anyone who was 25 or

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(2016) 40 N.Y.U. Rev. L. & Soc. Change 139, 165-167; Buchen, *Science in Court: Arrested Development* (2012) 484(7394) Nature 304, 306; Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy* (2009) 45(3) J. of Adolescent Health 216, 217.

[126] *Roper*, *supra*, 543 U.S. at pp. 570, 572; *Graham v. Florida* (2010) 560 U.S. 48, 68, 75 (prohibiting life without parole sentences for children convicted of non-homicide offenses); *Miller, supra,* 567 U.S. at p. 489 (prohibiting life without parole sentences for children convicted of homicide).

[127] Monahan et al., *Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior* (2013) 25(4) Development & Psychopathology 1093, 1093-1105; Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders* (2010) 22(2) Development & Psychopathology 453, 468; Bonnie & Scott, *The Teenage Brain: Adolescent Brain Research and the Law* (2013) 22 Current Directions in Psychological Science 158, 160.

[128] *Roper*, *supra*, 543 U.S. at pp. 572-573.

[129] *Id.* at p. 573.

[130] See Assem. Com. on Pub. Safety, Bill Analysis on Assem. Bill No. 1308 (2017-2018 Reg. Sess.) Apr. 24, 2017, p. 4.

younger at the time of their offense, with very limited exceptions, most notably for those sentenced to life without parole or death for offenses committed after attaining the age of 18, be given the opportunity to be considered for parole.[131] California law requires that all incarcerated persons below age 22 be classified at lower security facilities whenever possible.[132] California extended juvenile court jurisdiction to 21.[133]

Recognizing the growing body of research on emerging adults, the American Bar Association has adopted a resolution urging "each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years or younger at the time of the offense."[134]

California's death row is nevertheless disproportionately populated by people who were 25 or younger at the time of their offense. Thirty-eight percent of people sentenced to death in California were 25 or under at the time of their offense.[135] A fifth of those sentenced to death were 21 or younger at the time of their offense. And, according to data compiled by the Habeas Corpus Resource Center, 45 people sentenced to death, or just under 5 percent of all those sentenced to death in California, were only 18 at the time of their offenses.

California leads all other jurisdictions in the post *Roper* era – outpacing even Texas and Florida – in imposing death sentences on people who were under 21 at the

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[131] Cal. Pen. Code, § 3051.

[132] Cal. Pen. Code, § 2905; see also Statement of Legislative Intent for Cal. Pen. Code, § 2905 (Stats. 2014, ch. 590 § 1 (4)(b)).

[133] See Cal. Welf. & Inst. Code, §§ 208.5, 607, 1731.5, 1769; see also Hayek, *Environmental Scan of Developmentally Appropriate Criminal Justice Responses to Justice-Involved Young Adults* (2016) U.S. Dept. of Justice, National Institute of Justice <https://www.ncjrs.gov/pdffiles1/nij/249902.pdf> (as of Feb. 22, 2021).

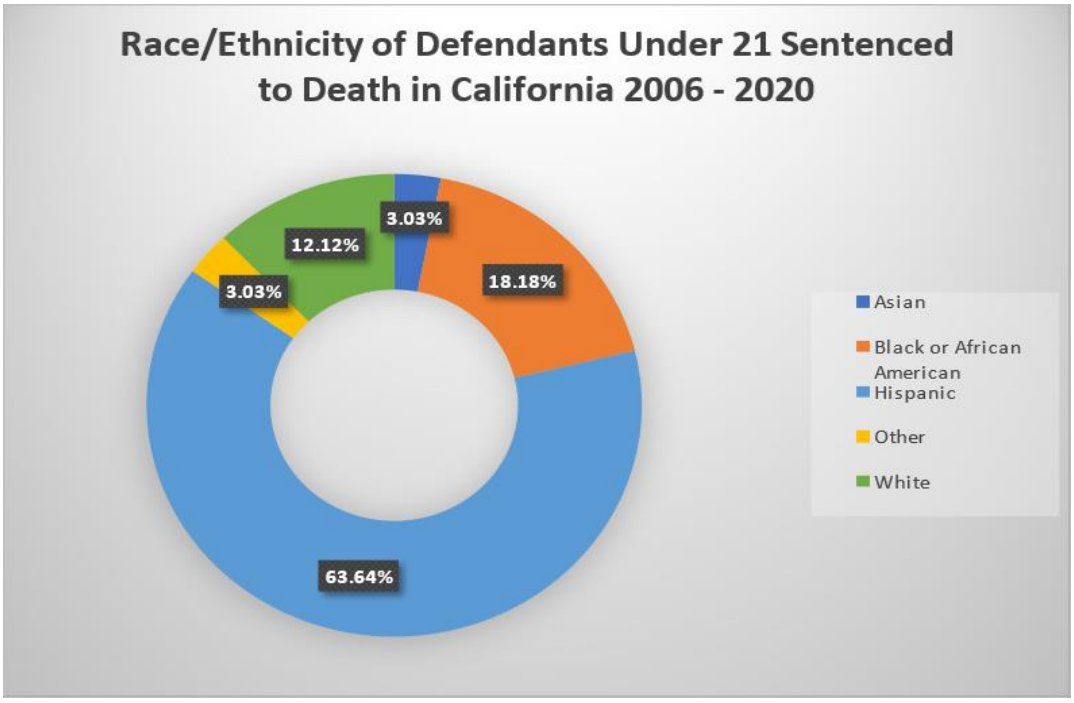
[134] Am. Bar Assoc., Resolution 111 and Report to the House of Delegates (adopted Feb. 5, 2018) <https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf> (as of Feb. 22, 2021).

[135] According to HCRC data on file with OSPD, as of November 2020, 1003 people had been sentenced to death (some with multiple death verdicts or judgments) in California since the death penalty was reinstated in 1977. HCRC's annual report includes one additional death sentence for a total of 1004. HCRC Report, *supra*, at p. 8.

time of their offense.[136] Two California counties – Los Angeles and Riverside – account for 15 percent of all such death sentences, even though they account for only 4 percent of the nation's population.[137]

Most disturbing, data show that the death penalty is imposed disproportionately on youth of color. Nationally, 73 percent of youthful offenders (defined here as under 21) sentenced to death since *Roper* were Black or Latinx, as compared to 53 percent of adults sentenced to death in that time.[138]

The figures in California are even worse: 82 percent of the youthful offenders sentenced to death in California since *Roper* was decided were Black or Latinx (18 percent and 64 percent respectively).[139]



[136] Blume et. al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One* (2020) 98 Tex. L.Rev. 921, 941.

[137] *Id.* at p. 942.

[138] *Id.* at p. 944.

[139] As noted above, the gang-murder special circumstances added in 2000 has been applied disproportionately to Latinx defendants. (See Grosso et al., *supra*, 66 UCLA L.Rev. at pp. 1435-1436.)

Among those 25 or under at the time of their offense, 64 percent were Black or Latinx (37 percent and 27 percent respectively) and 23 percent were White. Among adults over 25 at the time of their crime, 49 percent were people of color (29 percent Black, 20 percent Latinx) and 42 percent were White. Thus, racial disparities are most extreme among the youngest offenders.

Research shows that "[t]his disparity between the severity of punishment leveled against black and Latinx youth compared to white youth is best explained by the fact that legal decision makers perceive youth of color as dangerous predators likely to recidivate, while for young white men and boys, youth is mitigating."[140]

Not only has California's death penalty been imposed disproportionately on youthful offenders – who are in fact *less* morally culpable than adults – but that perverse result has been exacerbated by racism, singling out youth of color for the most extreme punishment.

B. People with Serious Mental Illness are Sentenced to Death

Although the Supreme Court has exempted those who are intellectually disabled or who were under the age of 18 at the time of the offense from the death penalty,[141] people who were seriously mentally ill at the time of the offense are still subject to the death penalty.

The principle that the mentally ill are not fully responsible for their actions is foundational to our criminal legal system,[142] but the law in practice affords few protections, because standards for incompetency to stand trial or for the insanity

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[140] Blume et. al., *supra*, 98 Tex. L.Rev. at pp. 944-945 & fn. 123 (collecting sources); see also Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* (2014) 106 J. Personality & Soc. Psychol. 526-527.

[141] *Roper, supra,* 543 U.S. 551 (youth); *Atkins v. Virginia* (2002) 536 U.S. 304 (*Atkins*) (intellectual disability).

[142] 4 Blackstone, Commentaries 24; Hochstedler Steury, *Criminal Defendants with Psychiatric Impairment: Prevalence, Probabilities and Rates* (1993) 84 J. Crim. L. & Criminology 352, 353 (while "rarely applied, the insanity defense has been of profound theoretical importance in defining the limits of criminal responsibility, and its resulting community moral sanction").

defense are very difficult to meet.[143] Our jails and prisons have become the new asylums.[144]

California's capital sentencing statute, like most, lists factors relating to a defendant's mental state that are supposed to weigh in mitigation against the death penalty.[145] In reality, the opposite is often true.[146]

Many seriously mentally ill defendants are unable to cooperate with defense counsel or assist in the preparation of a defense.[147] Serious mental illnesses often

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[143] See Kachulis, *Insane in the Mens Rea: Why Insanity Defense Reform Is Long Overdue* (2017) 26 S. Cal. Interdisc. L.J. 357, 362 (despite public perception to the contrary, "[t]he reality is that the insanity defense is a device that is rarely used and even more rarely successful"); Sabelli & Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System* (2000) 91 J. Crim. L. & Criminology 161, 170 (competency standard often criticized as "unreasonably low and allows individuals whose ability to reason is severely clouded by a mental illness or other disability to be found competent"); Goldbach, *Like Oil and Water: Medical and Legal Competency in Capital Appeal Waivers* (2000) 1 Cal. Crim. L.Rev. 2.

[144] It is estimated that severe mental illness among the incarcerated population is three to six times higher than in the general U.S. population. See Davis & Brekke, *Social Networks and Arrest Among Persons With Severe Mental Illness: An Exploratory Analysis* (2013) 64 Psychiatric Services 1274, 1274.

[145] Cal. Pen. Code, § 190.3 (d) & (h) (sentencing factors include whether defendant "under the influence of extreme mental or emotional disturbance" and whether the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication"); see also Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing* (1989) 89 Colum. L.Rev. 291, 297-298 & fns. 45-47 (citing other state statutes).

[146] Smith et al., *The Failure of Mitigation?* (2014) 65 Hastings L.J. 1221, 1245 ("Over half (fifty-four) of the last one hundred executed offenders had been diagnosed with or displayed symptoms of a severe mental illness."); Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487, 518-519 (hereafter *The Unreliability Principle*).

[147] The symptoms of serious mental illness often impede the attorney-client relationship. Davoli, *You Have the Right to an Attorney; If You Cannot Afford One, Then the Government Will Underpay an Overworked Attorney Who Must Also Be an Expert in Psychiatry and Immigration Law* (2012) 2012 Mich. St. L.Rev. 1149, 1171; see also Am.

distort decision-making. Mentally ill defendants may direct their attorneys not to present a mental health defense because of stigma or lack of insight.[148] Profoundly depressed defendants may try to prevent their attorney from presenting mitigating evidence to fulfill a wish to die.[149] Others may insist on testifying or representing themselves in pursuit of a death sentence.[150]

Self-representation compromises the reliability of a trial in the best of circumstances, since few people are equipped to represent themselves in a serious criminal trial, let alone a capital case.[151] The damage is even worse when the defendant is seriously mentally ill.

The California Supreme Court has held that a defendant must be allowed to represent himself even if he intends to present no defense or to ask for the death penalty.[152] The Court has rejected the argument that the state's interest in ensuring

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Bar Assoc., Diminished Culpability (2006) 30 Mental & Physical Disability L.Rep. 62 (describing case of capital murder defendant Jackson Daniels, Jr.).

[148] See Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses* (2005) 54 Cath. U. L.Rev. 1153, 1164; *United States v. Kaczynski* (9th Cir. 2001) 239 F.3d 1108, 1111-1113.

[149] See, e.g., *Godinez v. Moran* (1993) 509 U.S. 389, 409-412 (dis. opn. of Blackmun, J.).

[150] See *Faretta v. California* (1975) 422 U.S. 806 (constitutional right to self-representation); *People v. Taylor* (2009) 47 Cal.4th 850, 865 (*Faretta* applies equally in capital cases); *People v. Mickel* (2016) 2 Cal.5th 181, 206-207, and cases cited therein (defendant may be mentally ill yet competent to waive their right to counsel).

[151] See *Faretta v. California*, *supra*, 422 U.S. at p. 832 (acknowledging that "the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel"); see also *id.* at p. 839 (dis. opn. of Burger, C.J.) (observing that the goal of justice "is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel"); *id.* at p. 849 (dis. opn. of Blackmun, J.) (asserting that majority ignores the principle that the state's interest is that justice be done).

[152] *People v. Daniels* (2017) 3 Cal.5th 961, 980-981 (lead opn. of Cuéllar, J.); see *People v. Burgener* (2016) 1 Cal.5th 461, 471-472 (defendant permitted to represent himself though he expressed desire to present no mitigating evidence and not contest death sentence); *People v. Taylor*, *supra*, 47 Cal.4th 850, 865 ("A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of

the reliability of death judgments requires a more rigorous standard to waive counsel in such cases.[153] And, because California does not conduct proportionality review[154] -- comparing capital cases with each other to maintain some degree of consistency, there is no mechanism to evaluate the propriety of the death judgments returned in cases where a mentally ill defendant represents himself and presents no mitigating evidence.

Mentally ill defendants are often wrongly penalized even when represented by counsel. Studies have shown that, just as juries often fail to treat youth or intellectual disability as mitigating, they often treat mental illness as aggravating because they believe it means the defendant is dangerous.[155] Serious mental illness may manifest in front of the jury in outbursts or other inappropriate remarks or gestures that alarm jurors.[156] When defendants are placed on antipsychotic medications, they often present with a flat affect, which jurors may perceive as lack of remorse.[157]

The American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and

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death"); *People v. Bradford* (1997) 15 Cal.4th 1229, 1366-1367 (trial court granted defendant's request to represent himself, though he made such request in order to ensure that no penalty phase evidence would be presented on his behalf and despite defense counsel's view that he was insane); *People v. Bloom* (1989) 48 Cal.3d 1194, 1220 (holding that a defendant's stated intention to incur the death penalty does not in and of itself establish an abuse of discretion in the granting of his self-representation motion).

[153] *People v. Daniels, supra,* 3 Cal.5th at pp. 985-986 (lead opn. of Cuéllar, J.); *People v. Mai* (2013) 57 Cal.4th 986, 1056; *People v. Bloom*, *supra*, 48 Cal.3d at pp. 1224-1226; *People v. Bradford, supra,* 15 Cal.4th at p. 1372.

[154] See, e.g., *People v. Gamache* (2010) 48 Cal.4th 347, 393.

[155] Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.Rev. 1109, 1165-1167; Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury* (1995) 70 Ind. L.J. 1103, 1131-1133; Hoffmann, *Where's the Buck?–Juror Misperception of Sentencing Responsibility in Death Penalty Cases* (1995) 70 Ind. L.J. 1137, 1153; Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings* (1995) 70 Ind. L.J. 1043, 1091.

[156] Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1563.

[157] Deadly Justice, *supra*, at p. 235; The Unreliability Principle*, supra,* 23 Wm. & Mary Bill Rts. J. at p. 515 & fn. 154, citing *Riggins v. Nevada* (1992) 504 U.S. 127, 143-144 (con. opn. Kennedy, J.).

Mental Health America, have all recommended exempting those with severe mental illness from the death penalty.[158] Ohio recently banned the death penalty for defendants who were severely mentally ill at the time of the offense, and other states are considering similar exemptions.[159]

The California Supreme Court has rejected the argument that serious mental illness should be treated like intellectual disability as a matter of constitutional law, stating "we are not prepared to say that executing a mentally ill murderer would not serve societal goals of retribution and deterrence" and deferring to the legislature "to determine exactly the type and level of mental impairment that must be shown to warrant a categorical exemption from the death penalty."[160]

California's cases are replete with examples of defendants suffering from serious mental illness whose death sentences have nevertheless been upheld:

- *People v. Ghobrial* (2018) 5 Cal.5th 250, 275 (court upholds death sentence of defendant with record of severe psychotic illness, rejecting both competency issues and Eighth Amendment serious mental illness challenge).
- *People v. Mendoza* (2016) 62 Cal.4th 856, 908 (upholding death sentence of defendant suffering from psychotic depression, rejecting competency issues and finding no constitutional prohibition on the execution of mentally ill persons).
- *People v. Mickel* (2016) 2 Cal.5th 181, 193, 200-201 (upholding death sentence and findings of competency despite mental health expert's preliminary assessment that defendant suffered from a mental disturbance and may have been incompetent to stand trial and letters from defendant's friends and family describing him as mentally ill).

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[158] Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness As the Next Frontier* (2009) 50 B.C. L.Rev. 785, 789; ABA Task Force on Mental Disability and the Death Penalty, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities (2006) 30 Mental & Physical Disability L.Rep. 668.

[159] DPIC, *Ohio Bars Death Penalty for People with Severe Mental Illness* (Jan. 11, 2021) <https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness> (as of Feb. 22, 2021).

[160] *People v. Mendoza* (2016) 62 Cal.4th 856, 909, quoting *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1252); accord, *People v. Ghobrial* (2018) 5 Cal.5th 250, 275. The issue is pending in another case before the California Supreme Court, *People v. Steskal*, argued February 2, 2021, S122611.

- *People v. Houston* (2012) 54 Cal.4th 1186, 1230 (upholding death sentence of defendant with psychotic illness, insanity defense rejected).
- *People v. Blacksher* (2011) 52 Cal.4th 769, 849 (court upholds death sentence of defendant with paranoid schizophrenia and a history of psychiatric hospitalizations, defendant was found competent to stand trial and insanity defense was rejected).
- *People v. Blair* (2005) 36 Cal.4th 686, 714 (upholding death sentence despite evidence of defendant's history of psychiatric hospitalization and upholding findings of competency).
- *People v. Danks* (2004) 32 Cal.4th 269 (court upholds death sentence of defendant with paranoid schizophrenia and history of psychiatric hospitalizations; defendant found competent to stand trial after being medicated, sought to represent himself, and testified incoherently; court noted defendant was "extremely dangerous" even when medicated).[161]
- *People v. Farnam* (2002) 28 Cal.4th 107, 131 (upholding death sentence despite defendant's history of attempting suicide).
- *People v. Weaver* (2001) 26 Cal.4th 876, 937-939, 953 (upholding death sentence although defendant was diagnosed with schizophrenia and suffered from hallucinations and delusions and upholding findings of competency and sanity).
- *People v. Jones* (1997) 15 Cal.4th 119, 134-135, 139-151 (upholding death sentence although defendant was diagnosed with schizophrenia, had history of psychiatric hospitalizations, was administered antipsychotic medications that appeared to cause him to fall asleep at his trial and upholding findings of competency and sanity).
- *People v. Medina* (1995) 11 Cal.4th 694, 724, 732-733 (upholding death sentence despite the administration of antipsychotic medications and evidence of defendant's psychotic disorder and upholding findings of competency).

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[161] Three justices dissented from the denial of penalty phase relief, citing the defendant's serious mental illness. *People v. Danks, supra*, 32 Cal.4th 269, 321-322 (conc. & dis. opn. of Kennard, J.); *id.* at pp. 322-323 (conc. & dis. opn. of Moreno, J.).) Justice Kennard and Chief Justice George noted that "the defense presented compelling evidence that defendant, although not legally insane at the time of the offenses (citations), suffered from a mental illness that destroyed his capacity for rational thought," and was "comparable in severity to mental retardation." (*Id.* at pp. 321-322 (conc. & dis. opn. of Kennard, J.).

When a seriously mentally ill defendant wins a rare reversal on appeal, prosecutors often elect to pursue the death penalty again:

- *People v. Deere* (1985) 41 Cal.3d 353, 358 (defendant was suicidal), sub. opn. (1991) 53 Cal.3d 705.
- *People v. Halvorsen* (2007) 42 Cal.4th 379, 399, 402 & fn. 3 (defendant had paranoid delusions, was diagnosed with bipolar disorder, testified incoherently at his first trial, and made a 2½-hour rambling statement in lieu of testimony at his retrial), S190636, app. on remand pending.
- *People v. Johnson* (1988) 47 Cal.3d 576, 597-598 (defendant had history of psychiatric hospitalization), sub. opn. (2019) 8 Cal.5th 475, 488-491 (cataloging further evidence of defendant's serious mental illness).
- *People v. Lucero* (1988) 44 Cal.3d 1006, 1032 (defendant suffered from a serious mental illness), sub. opn. (2000) 23 Cal.4th 692.

C. People with Intellectual Disabilities Are Still on Death Row

In *Atkins v. Virginia* (2002) 536 U.S. 304, the United States Supreme Court held that executing people with mental retardation (now intellectual disability) violates the Eighth Amendment's prohibition on cruel and unusual punishment. Due to the shortage of qualified habeas counsel in California, discussed below, not all intellectually disabled defendants who were sentenced to death before *Atkins* was decided have even been identified, let alone obtained relief.[162]

Moreover, the *Atkins* decision left it largely to the states to define intellectual disability.[163] California's statute was recently amended to define "[i]ntellectual disability" as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested

[162] The California Supreme Court has held that postconviction *Atkins* claims "should be raised by petition for writ of habeas corpus proceedings." *In re Hawthorne* (2005) 35 Cal.4th 40, 47; accord § 1376, subd. (f). According to HCRC, of the 363 people on death row awaiting the appointment of counsel, 85 have been waiting for more than 20 years – that is, before *Atkins* was decided. HCRC Report, *supra*, at p. 9.

[163] This has generated "a great deal of controversy not only in defining the term, but also in creating the procedural structure for making the determination." Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate* (2008) 13 Berkeley J. Crim. L. 215, 215, 226.

before the end of the developmental period, as defined by clinical standards."[164] Clinical standards have recently changed to extend the "developmental period" from 18 to 22.[165]

This means that defendants who suffer traumatic brain injury or otherwise manifest intellectual or mental disability *after* the "developmental period" are not excluded from the death penalty, even though they may suffer from the same kind of impairments that led the high court to find intellectually disabled defendants categorically less culpable and therefore ineligible for the death penalty.[166]

The ABA's Task Force on Mental Disability and the Death Penalty, which recommended excluding seriously mentally ill people from death eligibility, also recommended that the mental disability exclusion "encompass dementia and traumatic brain injury, disabilities very similar to mental retardation in their impact on intellectual and adaptive functioning except that they always (in the case of dementia) or often (in the case of head injury) are manifested after age eighteen."[167] The American Psychological Association and the National Alliance of the Mentally Ill have taken the same position.[168]

Here, too, the California Supreme Court has rejected arguments that *Atkin*'s rationale extends to similar mental disabilities, holding that it is for the legislature

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[164] Cal. Pen. Code, § 1376, subd. (a)(1), Stats. 2020, c. 331 (A.B.2512), § 2, eff. Jan. 1, 2021. Prior to this amendment, California required intellectual disability to manifest by age 18. *In re Hawthorne* (2005) 35 Cal.4th 40, 48; accord, *In re Lewis* (2018) 4 Cal.5th 1185, 1191.

[165] On January 15, 2021, the American Association on Intellectual and Developmental Disabilities (AAIDD) issued its newest diagnostic manual for Intellectual Disability, which extended the age of onset from 18 to 22. (Schalock et al., Intellectual Disability: Definition, Classification and Systems Of Supports (AAIDD, 12th ed. 2021).)

[166] See *Atkins*, *supra,* 536 U.S. at pp. 318-319; Barger, *supra*, 13 Berkeley J. Crim. L. at p. 230.

[167] ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, *supra*, 30 Mental & Physical Disability L.Rep. at p. 669.

[168] Barger, *supra*, 13 Berkeley J. Crim. L. at p. 233.

to decide "the type and level of mental impairment" that "warrant a categorical exemption from the death penalty."[169]

D. The Death Penalty is Imposed on People who were Abused and Neglected as Children

The death penalty is also imposed too often on people who have been raised in extreme poverty and experienced horrific abuse and neglect as children.[170] Those who have been scarred by childhood abuse and neglect are not fairly labeled the "worst of the worst," particularly when the state itself failed to protect them from mistreatment.

In the last 25 years we have come to better understand the harm done by adverse childhood experiences. Scientific studies have documented that childhood abuse and neglect causes neurological damage that may in some cases lead to criminal behavior in adulthood.[171] More broadly, the Centers for Disease Control (CDC) and Kaiser Permanente have conducted a study of Adverse Childhood Experiences (ACEs) that is one of the largest investigations ever of the connection between childhood abuse and neglect and household challenges and later-life health

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[169] *People v. Boyce* (2014) 59 Cal.4th 672, 722, quoting *People v. Hajek & Vo, supra*, 58 Cal.4th at p. 1252. In *People v. Leonard* (2007) 40 Cal.4th 1370, 1428, the Court declined to address the constitutionality of the age 18 cut off on the ground that the factual record was insufficient and would have to be developed in habeas proceedings.

[170] See Channah & Blakinger, *What Lisa Montgomery Has In Common With Many On Death Row: Extensive Trauma*, The Marshall Project (Jan. 8, 2021) (linking to other sources) <https://www.themarshallproject.org/2021/01/08/what-lisa-montgomery-has-in-common-with-many-on-death-row-extensive-trauma> (as of Feb. 22, 2021); Haney, Criminality in Context (2020) pp. xv-xviii, 407-412; Office of the High Commissioner for Human Rights, *Death Penalty Disproportionately Affects the Poor, UN Rights Experts Warn, U.N. Press Release HR/22208* (Oct. 10, 2017) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E> (as of Feb. 22, 2021); Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation* (1995) 35 Santa Clara L.Rev. 547.

[171] See, e.g., Ling et al., *Biological Explanations of Criminal Behavior* (2019) 25 Psychology, Crime & Law 626, 626-640; Dudley, *Childhood Trauma and Its Effects: Implications for Police*, New Perspectives in Policing Bulletin (July 2015); Perry, Child Maltreatment: A Neurodevelopmental Perspective on the Role of Trauma and Neglect in Psychopathology, Child and Adolescent Psychopathology (Beauchaine & Hinshaw edits., 2008) p. 93; Heide & Solomon, *Biology, Childhood Trauma, and Murder: Rethinking Justice* (2006) 29 Internat. Law J. of Law and Psychiatry 220, 220-233.

and well-being. ACEs, are potentially traumatic events that occur in childhood (0-17 years). For example:

- experiencing violence, abuse, or neglect
- witnessing violence in the home or community
- having a family member attempt or die by suicide.[172]

ACEs also include aspects of the child's environment that can undermine their sense of safety, stability, and bonding, such as growing up in a household with:

- substance misuse
- mental health problems
- instability due to parental separation or household members being in jail or prison.[173]

The CDC-Kaiser Permanente study revealed that ACEs are strongly related to development of risk factors for disease and lack of well-being throughout life, including chronic health problems, mental illness, substance misuse in adulthood, and ultimately early death.[174] Negative outcomes associated with ACEs also include aggressive behavior and adult criminal involvement.[175]

Not surprisingly, incarcerated people "reported nearly four times as many adverse events in childhood as a normative adult male sample."[176] Eight of ten adverse childhood events were found at significantly higher levels among incarcerated people than in the general population.[177]

In a recent study, adverse childhood experiences "were specifically associated with adult incarceration even after controlling for sociodemographic and substance

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[172] Felitti et al, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study* (1998) 14 Am. J. of Preventive Med. 245, 245-258.

[173] *Ibid.*

[174] *Ibid.*

[175] Reavis et al., *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?* (2013) 17 The Permanente J. 44, 44-48.

[176] *Ibid.*

[177] *Ibid.*

abuse problems."[178] Individuals with the most severe ACEs profile experience the highest risk of incarceration: risk increased approximately 35 percent for men and 10 percent for women.[179]

Adverse childhood experiences in the home are often exacerbated by poor treatment in juvenile institutions that actually "promote crime rather than deter it."[180] While child victimization receives considerable attention, "little such concern is extended to children once they have 'gotten in trouble,' despite the fact that they are often the very same children."[181] Studies and anecdotal evidence have shown that "[t]oo often in the lives of capital defendants juvenile institutionalization provides a kind of 'turning point,' an experience that helps them resolve the internal struggle over who to be – indeed, over who they can be – in a profoundly negative way."[182]

Adverse childhood experiences are critical mitigating evidence that can help jurors understand a defendant's background and lead them to exercise mercy.[183]

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[178] Roos et al., *Linking Typologies of Childhood Adversity to Adult Incarceration: Findings from a Nationally Representative Sample* (2016) 86 Am. J. of Orthopsychiatry 584, 591.

[179] *Id.* at page 589.

[180] Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation* (1995) 35 Santa Clara L.Rev. 547, 575.

[181] *Id.* at p. 574.

[182] *Id.* at pp. 574-576.

[183] See *Porter v. McCollum* (2009) 558 U.S. 30, 41-42 (per curiam) (reasonable probability mitigating evidence – which included childhood history of physical abuse and limited schooling – would have lead decisionmakers at penalty phase to strike different balance); *Rompilla v. Beard* (2005) 545 U.S. 374, 390-393 (undiscovered mitigation – which included evidence that petitioner, who suffered from fetal alcohol syndrome caused by his often-absent mother, was reared without affection by severe alcoholics in isolated and filthy slum, observed violence between parents and father's bragging about infidelity, and was beaten, verbally abused, and locked in small, filthy dog pen by father – might well have influenced jury's appraisal of petitioner's culpability and thus undermined confidence in sentencing outcome); *Wiggins v. Smith* (2003) 539 U.S. 510, 535, 537 (had jury received mitigating evidence – "severe privation and abuse in the first six years of [petitioner's] life while in the custody of his alcoholic, absentee mother," followed by "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care" – there was reasonable probability at least one juror would have struck different balance); *(Terry) Williams v. Taylor* (2000) 529 U.S. 362, 398 ("the graphic description of [petitioner's] childhood,

Conducting a competent mitigation investigation before trial often enables defense counsel to persuade the prosecution to forego the death penalty.[184] Unfortunately, as explained below, the quality of indigent defense in California remains uneven and, too often, trial counsel do not do a constitutionally adequate job of investigating and presenting mitigating evidence.

The case of Jesse Andrews III is illustrative. Mr. Andrews was convicted and sentenced to death in Los Angeles County by a jury that heard essentially none of his life story, which was defined by poverty, neglect, abandonment, racism, violence, torture, and abject institutional failure. Following a (rare) state court evidentiary hearing, the California Supreme Court described the evidence that trial counsel could have presented if they had investigated Andrews' life history: [185]

- Andrews' alcoholic parents abandoned him when he was a toddler. He was raised by his grandparents and an aunt and was especially close to his grandfather. When Andrews' grandfather died, Andrews lost most of the structure in his life, resulting in truancy, delinquency and eventual conviction, at age 14, for joyriding.
- Andrews was sent to Mt. Meigs Industrial School for Negro Children, an Alabama institution described by a juvenile probation officer "as 'by far, by far . . . the worst facility I have ever seen,' a 'slave camp for children' run by 'illiterate overseers.'"
- Andrews was preyed on sexually by older boys, "from whom no protection or separation was provided."

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filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability"); see also *Andrus v. Texas* (2020) 140 S.Ct. 1875, 1877, 1887 (per curiam) ("significant question" whether mitigation evidence – maternal drug addiction and dealing, prostitution, and prolonged absence, as well as time spent with violent drug addicts, necessity before adolescence to caretake four siblings, and juvenile incarceration that left petitioner suicidal – might have led at least one juror to strike different balance).

[184] Am. Bar Assoc., *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003), Guidelines 10.7(A), 10.9.1 & commentary, reprinted in 31 Hofstra L.Rev. 913, 1023, 1041-1042 (hereafter ABA Guidelines).

[185] The following facts are from *In re Andrews* (2002) 28 Cal.4th 1234, 1242-1245; *id.* at p. 1268 (dis. opn. of Kennard, J.).

- Mt. Meigs provided no education. Instead, the children were forced to pick cotton and other crops. When Andrews and the other boys failed to pick their quota, the overseer beat them in a brutal and sexually demeaning manner.
- Just three months after his release from Mt. Meigs at age 16, Andrews was arrested for a robbery-murder in which he had served as the look-out. Andrews was convicted and spent the next 10 years in several Alabama prisons, described by the referee as "abysmal," characterized by severe overcrowding and rampant violence, sexual and otherwise. Andrews was raped repeatedly.
- Mental health experts would have testified that Andrews had a learning disorder, brain impairment and posttraumatic stress disorder as a result of his victimization in juvenile prison.
- Andrews also had a large extended family who would have testified to their love and support for him and the impact of his execution on them.

Despite their failure to find and present this evidence, the California Supreme Court ruled five to two that Andrews' counsel had ***not*** provided ineffective assistance of counsel and upheld his death sentence – a decision the Ninth Circuit Court of Appeals held – 17 years later – to be a patently unreasonable application of United States Supreme Court precedent.[186] Mr. Andrews' death sentence was finally vacated, 35 years after his trial and 40 years after the crime for which he was sentenced.

Unfortunately, Mr. Andrews' case is far from unique in either the severity of the trauma and abuse he experienced in his youth or in the lengthy path to finally obtain relief from his death sentence once the mitigating evidence and failures of trial counsel were brought to light.[187] For example:

- *Doe v. Ayers* (9th Cir. 2015) 782 F.3d. 425, 435-462 (defense counsel failed to investigate and present mitigating evidence that defendant was repeatedly raped in prison, experienced childhood abuse and neglect, and had mental health and substance abuse problems).
- *Stankewitz v. Wong* (9th Cir. 2012) 698 F.3d 1163, 1168, 1174 (because defense counsel failed to investigate or present mitigating evidence, jury

[186] *Andrews v. Davis* (9th Cir. 2019) 944 F.3d 1092, 1110 (en banc).

[187] Far from showing that the system works, the decades that it often takes for someone like Mr. Andrews to obtain reversal of his death sentence is further evidence of the dysfunction of California's death penalty, as discussed further below.

heard "next to nothing about [petitioner's] traumatic childhood" in extreme poverty as one of 10 children who were "highly neglected" by their alcoholic parents, exposed to domestic violence, and beaten with belts and electrical cords, leaving Stankewitz severely emotionally damaged).

- *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1131 (jury had no knowledge of the indisputably horrific treatment Hamilton and his siblings suffered at the hands of his mother, father, and various extended family members and did not hear that Hamilton had been diagnosed with mental health problems as early as age twelve).
- *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1088 (counsel failed to discover and present evidence that defendant was abandoned as a child and entrusted to an abusive, alcoholic foster father who frequently kept him locked in a closet; rarely had enough food; and was beaten and raped in jail at the age of fifteen).
- *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1139 (failure to present any evidence of the substantial abuse suffered by defendant; available records showed that defendant's father and stepfather "viciously beat" him and his mother on a regular basis).
- *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1251, 1255 (defense counsel failed to investigate and present evidence that Caro – the child of farm laborers – suffered extensive brain damage as a result of chronic exposure to pesticides from in utero to adulthood, as well as severe physical, emotional, and psychological abuse as a child).

E. California Has Sentenced Innocent People to Death

Not only does California's death penalty system fail to condemn only the worst of the worst, but it has ensnared even the innocent. Since the reinstitution of the death penalty in California in 1977, five formerly death-sentenced men have been exonerated, all people of color: Ernest Graham was exonerated in 1981 after spending five years on death row; Troy Jones was exonerated in 1996 after 14 years on the row; Oscar Morris was exonerated in 2000 after 17 years; Patrick Croy was exonerated in 2005 after 26 years; and Vicente Benavides Figueroa was exonerated in 2018 after 25 years.[188]

[188] DPIC, *Innocence Database* (2021) <https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5Bstate%5D=California> (as of Feb. 22 2021).

Mr. Benavides' exoneration is the most recent in California.[189] Mr. Benavides was convicted and sentenced to death for sexually assaulting and murdering his girlfriend's 21-month-old daughter.[190] The state conceded, decades after his conviction, that the prosecution had introduced false forensic evidence at trial regarding the cause of the alleged sexual injuries to the child, injuries which were determined at the post-conviction hearing to be anatomically impossible.[191] Despite conceding that Mr. Benavides' convictions of the substantive sexual offences, special circumstance findings, and judgment of death must be vacated, the state urged the California Supreme Court to reduce his conviction from first to second degree murder; the court rejected that argument and vacated Mr. Figueroa's conviction in its entirety.[192]

False or misleading forensic evidence and government misconduct are far from the only causes of wrongful convictions. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide.[193] Junk science, false confessions, bad lawyering, and government informants (i.e., those who have a self-interested motive to testify for the prosecution) are also major factors contributing to wrongful convictions.[194]

A study of exonerations among defendants sentenced to death in the modern era estimated that about four percent of all people on death row are innocent.[195] That would translate to approximately 28 innocent people on death row in California, given the state's current death row population.[196]

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[189] *In re Figueroa* (2018) 4 Cal.5th 576, 579.

[190] *Ibid.*

[191] *Id.* at pp. 583-586.

[192] *Id.* at p. 579.

[193] West & Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings From the First 25 Years* (2016) 79 Alb. L.Rev. 717, 720, 732.

[194] *Ibid.*

[195] Gross et al., *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death* (2014) <https://www.pnas.org/content/pnas/111/20/7230.full.pdf> (as of Feb. 22, 2021).

[196] Cal. Dept. of Corrections and Rehabilitation, *Condemned Inmate List* (2021) <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request> (as of Feb. 22, 2021).

V. OTHER SYSTEMIC FLAWS CONTRIBUTE TO THE ARBITRARINESS OF CALIFORNIA'S DEATH PENALTY

The arbitrary and discriminatory application of California's death penalty law is also due to the poor quality of indigent defense and a statutory provision that gives the prosecution multiple chances to obtain a death verdict.

A. The Poor Quality of Indigent Defense

Twenty years ago, law professor Stephen Bright wrote that the death penalty in America is handed down "not for the worst crime, but for the worst lawyer."[197] "It is universally acknowledged that ineffective counsel is the primary reason so many defendants are sentenced to death."[198] Correcting this problem in individual cases is not easy. In order to demonstrate ineffective assistance of counsel post-trial, the condemned person must show both that counsel's performance fell below the standard of care of a professionally reasonable attorney, and that there is a reasonable likelihood of a different outcome but for counsel's deficient performance.[199] Further, since 1996 in order to obtain federal habeas relief, a petitioner must also show that a state court denial of such a claim was objectively unreasonable.[200]

Nevertheless, of 70 California death sentences reversed in federal court, over half (37)[201] were overturned on the basis of ineffective assistance of counsel, with by far the greatest number (31)[202] overturned due to counsel's failure to investigate and present mitigating evidence in the penalty phase. Additionally, the California Supreme Court has several times concluded that defense counsel's investigation of mitigating circumstances was inadequate, requiring reversal of the jury's determination of the penalty phase.[203] In fact, the leading cause of reversal of death

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[197] Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer* (1994) 103 Yale L.J. 1835.

[198] Mitchell & Haydt, Alarcón Advocacy Ctr., *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* (2016) 1 Loyola Law School Special Rep., p. 27.

[199] *Strickland v. Washington* (1984) 466 U.S. 668, 684, 691.

[200] 28 U.S.C. § 2254(d).

[201] HCRC data on file with OSPD.

[202] Data on file with OSPD.

[203] See, e.g., *In re Marquez (*1992) 1 Cal.4th 584; *In re Lucas* (2004) 33 Cal.4th 682.

judgments in California is "the failure of counsel to adequately investigate potential mitigating evidence."[204]

The overwhelming majority of men and women sentenced to death are indigent and were provided appointed trial counsel by the county. The high reversal rate for ineffective assistance of counsel is due to county and State unwillingness to adequately fund indigent capital defense at the trial level. Many counties use a problematic flat fee contract system for payment of non-public defender counsel in capital cases.[205] The fee structure in Riverside County incentivizes taking cases to trial, rather than negotiating a plea to a sentence less than death.[206] It also disincentivizes the "early investment in essential mitigation investigation, which . . . is widely considered to be the biggest driver for prosecutors deciding not to seek the death penalty."[207] Most of the "Riverside County death sentences reviewed on direct appeal between 2006 and 2015 involved the equivalent of one full day's worth or less of mitigation evidence, and two-thirds of the cases involved two days or less."[208] Some cases "had zero hours of mitigation presented."[209]

There are similar problems in other counties with large numbers of death penalty cases. In Kern County the typical presentation of defense mitigation evidence is less than 3 days.[210] In Orange County, the average defense mitigation presentation lasted 2.5 days.[211] In one Orange County case, defense counsel presented no mitigation evidence whatsoever.[212] In another case, the mitigation defense case was an hour.[213] In San Bernardino County, the average mitigation case lasted 1.2 days.[214] Most of the individuals on death row from Los Angeles County were represented at

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[204] CCFAJ Report, *supra*, at p. 129.

[205] *Id.* at pp. 125-126.

[206] FPP I, *supra*, at p. 33.

[207] *Ibid.*

[208] *Id.* at pp. 33-34.

[209] *Id.* at p. 34.

[210] *Id.* at p. 38.

[211] FPP II, *supra*, p. 42.

[212] *Ibid.*

[213] *Ibid.*

[214] *Id.* at p. 17.

trial by private counsel.[215] For those cases, the average defense mitigation presentation lasted only 2.4 days.[216] In contrast, the length of the mitigation case for the single death row defendant represented by the Los Angeles County public defender was 7 days.[217]

Many of the problems in indigent capital defense result from trial courts' repeated appointment of defense counsel with demonstrated records of incompetence.[218] In Los Angeles, of the 22 death penalty sentences imposed during the tenure of former District Attorney Jackie Lacey over a third were represented by counsel who "had prior or subsequent misconduct charges."[219]

The number of cases reversed thus far does not tell the whole story. Logically, given the 363 individuals who are still awaiting habeas counsel, there are dozens more individuals who would not be sitting on death row but for trial attorney ineffectiveness.[220]

Although the multiple problems with indigent defense counsel at trial have existed for decades, the State has failed to provide adequate resources for capital defense counsel. In 2008, the Commission found that the provisions for capital trial counsel for many counties did not meet the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which the United States Supreme Court and the California Supreme Court have long recognized as establishing norms for competent representation in death penalty cases.[221] The Commission recommended that "California counties provide adequate funding for the appointment and performance of trial counsel in death penalty cases

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[215] *Id.* at p. 30; American Civil Liberties Union, The California Death Penalty is Discriminatory, Unfair and Officially Suspended. So Why Does Jackie Lacey Continue to Use It? (2019) p. 3 (hereafter ACLU LA Report).

[216] FPP II, *supra*, at p. 30.

[217] *Ibid.*

[218] *Id.* at pp. 17, 42; FPP I, *supra*, at pp. 34, 38-39.

[219] ACLU LA Report, *supra*, at p. 2.

[220] See HCRC Report, *supra*, at p. 10 (reporting 363 individuals on death row without habeas counsel).

[221] CCFAJ Report, *supra*, at p. 130; see *Wiggins v. Smith, supra,* 539 U.S. at p. 524 (ABA Guidelines establish "standards to which we long have referred as 'guides to determining what is reasonable.'"); *In re Lucas*, *supra*, 33 Cal.4th at p. 725 (recognizing *Wiggins'* reliance on ABA Guidelines).

in full compliance with ABA [g]uidelines . . . ."[222] Nevertheless, as shown above, many California counties (including those most likely to sentence defendants to death) continue to appoint unqualified and poorly resourced counsel who are unprepared to take on the responsibilities of a capital case.

In his Executive Order declaring a moratorium on the use of the death penalty, Governor Newsom recognized that the death penalty is "unjustly and unfairly applied to people who cannot afford legal representation."[223] The State's failure to ensure constitutionally adequate counsel has contributed to the overproduction of death sentences. Without a system for competent indigent capital defense, poverty and the other arbitrary factors described elsewhere in this Paper, play an impermissible role in the administration of capital punishment in California.

B. Automatic Penalty Retrials

In most jurisdictions, when the jury cannot agree unanimously to impose a death sentence, the defendant receives a life sentence. In California, however, a penalty retrial is not only permitted, it is the statutory default; and if a second jury deadlocks, the prosecution is permitted to try yet again.[224] This provision contributes to the overproduction of death sentences in California, including its imposition on people the original jury did not agree were deserving of death.

Of the 28 states still permitting the use of capital punishment, only five — Alabama, Arizona, California, Kentucky, and Nevada[225] — authorize a penalty phase retrial before another jury if the initial jury deadlocks on penalty.[226] But California

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[222] CCFAJ Report, *supra*, at p. 131.

[223] Governor's Exec. Order N-09-19 (Mar. 13, 2019) <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf> (as of Feb. 3, 2021).

[224] Cal. Pen. Code § 190.4, subd. (b). The provision giving the prosecution multiple opportunities to secure a death verdict was added by section 10 of Proposition 7, the 1978 initiative that expanded the death penalty.

[225] Ala. Code, § 13A-5-46, subd. (g); Ariz. Rev. Stat., § 13-752, subd. (K); Cal. Pen. Code § 190.4, subd. (b); *Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 681 (holding of state high court that, in the absence of specifically controlling legislation, penalty phase retrials may go forward after original capital-sentencing juries deadlock); Nev. Rev. Stat., § 175.556, subd. (1).

[226] Indiana and Missouri permit a judge to impose a sentence of death following a jury deadlock on sentence. See Ind. Code, § 35-50-2-9, subd. (f) ("If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall

does not merely authorize a penalty retrial after a hung jury, it mandates one.[227] Only one other state, Arizona, mandates a penalty retrial, but in Arizona, if the second jury deadlocks, the judge imposes a sentence of life.[228] Alabama is the only other state allowing the prosecutor to retry the defendant multiple times when a retrial also ends in a hung jury.[229] Thus, California is the only state to afford the prosecution a penalty retrial as a matter of right after a first deadlocked jury at penalty and to authorize additional retrials if the prosecutor fails to obtain a unanimous verdict at a second or subsequent retrial.

The California Supreme Court has rejected challenges to the penalty retrial provisions based on the statute's outlier status, holding either that California's status in the extreme minority "does not, in and of itself, establish a violation of the Eighth Amendment"[230] or speculating that other states' decisions to prohibit multiple penalty retrials does not reflect a moral consensus, but is instead a "cost-benefit judgment[] about the value of continuing to allocate resources toward seeking the death penalty in a particular case."[231]

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discharge the jury and proceed as if the hearing had been to the court alone"); *State v. Barker* (Ind. 2004) 809 N.E.2d 312, 315-316; Mo. Rev. Stat., § 565.030, subd. (4).

[227] "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and *shall* order a new jury impaneled to try the issue as to what the penalty shall be." (Cal. Pen. Code, § 190.4, subd. (b), italics added.) California previously adhered to the majority rule prohibiting penalty phase retrials following hung juries. (*People v. Kimble* (1988) 44 Cal.3d 480, 511.) However, California is now "among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty." (*People v. Taylor* (2010) 48 Cal.4th 574, 634.)

[228] Ariz. Rev. Stat., § 13-752, subd. (K).

[229] California's statute states, "If [the newly impaneled jury] is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without possibility of parole." (Cal. Pen. Code, § 190.4, subd. (b).) Alabama's statute reads: "If the jury is unable to reach a verdict recommending a sentence, or for other manifest necessity, the trial court may declare a mistrial of the sentence hearing. Such a mistrial shall not affect the conviction. After such a mistrial or mistrials another sentence hearing shall be conducted before another jury, selected according to the laws and rules governing the selection of a jury for the trial of a capital case." (Ala. Code § 13A-5-46, subd. (g).)

[230] *People v. Rhoades* (2014) 8 Cal.5th 393, 442.

[231] *People v. Trinh* (2014) 59 Cal.4th 216, 238.

In fact, most jurisdictions based their death penalty schemes on the Model Penal Code,[232] which required trial courts to impose a noncapital sentence if a jury could not agree on penalty.[233] Addressing California's penalty retrial provisions, the drafters wrote, "The fact that the Model Code does not permit this alternative is deliberate. One submission ought to be enough, and, if there is disagreement, the court should terminate the matter by imposing a sentence of imprisonment."[234]

Limiting the prosecution to one chance to obtain a death sentence is also appropriate because the prosecution enjoys the enormous advantage of a "death qualified" jury. Such jurors are more pro-prosecution and "significantly more in favor of the death penalty than jury pools in general."[235] Moreover, if a jury is unable to reach a unanimous verdict, it will not be discharged until the court has determined "there is no reasonable probability that the jury can agree."[236] If a death-qualified jury, presented with the state's best evidence for death and instructed on their duty to deliberate thoroughly and return a verdict, cannot reach a unanimous conclusion that the defendant should die, the juror's disagreement demonstrates that the prosecution failed to make a reliable case for death.

Eighty-three death sentences in California – or nearly eight percent of the 1,077 death sentences imposed in the modern era – have been imposed after the prosecution failed to persuade the first jury to return a sentence of death; some defendants went through two or more penalty phase trials before the prosecution was

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[232] See Covey, *supra,* 31 Hastings Const. L.Q. at pp. 207-209.

[233] Model Pen. Code, § 210.6, subd. (2) (withdrawn 2009).

[234] *Id.* at p. 150, fn. 126, citing former Cal. Pen. Code, § 190.1. The drafters were addressing California's pre-*Anderson* death penalty law, which provided that, in the event of a hung jury at penalty, the court may "either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty." Former Cal. Pen. Code, § 190.1 (Stats. 1957, ch. 1968, § 2, pp. 3509-3510). As discussed above, California's current law goes further, by making a penalty retrial the default when the jury hangs.

[235] Death Qualification, *supra,* at p. 2 and citations therein.

[236] Cal. Pen. Code, § 1140 ("Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict . . . or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree").

able to obtain a unanimous death verdict.[237] Those defendants would have received life sentences in almost every other jurisdiction.

VI. THE DEATH PENALTY IS EXPENSIVE AND RIDDLED WITH ERROR

The death penalty is an enormously costly endeavor that yields no benefit for the taxpayers of California. Most of the death judgments the State has obtained and defended at great expense are ultimately reversed, and the lengthy delays in the process eliminate any legitimate penological purpose the sentence could serve.

A. Taxpayers Spend Billions on the Death Penalty

In their extensive analysis of California's capital punishment system published in 2011, Judge Arthur Alarcón [238]

At every level, from trial through appeal through post-conviction litigation, a capital case costs much more than a non-capital case. While it is difficult to ascertain the exact extra cost that the death penalty adds to a criminal justice system,[239]

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[237] See *People v. Richardson* (S198378, app. pending) (two mistrials, third penalty jury returned death verdict); *People v. Charles* (2015) 61 Cal.4th 308, 332 (defendant sentenced to death following four penalty trials, the first two juries hung, the death verdict of the third jury was set aside due to juror misconduct, and the fourth jury returned a verdict of death); *People v. Trinh* (2014) 59 Cal.4th 216, 223 (two hung juries, third penalty jury returned death verdict).

[238] Alarcón & Mitchell, *Executing the Will of the Voters? A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle* (2011) 44 Loyola L.A. L.Rev. S41, S46, (hereafter Roadmap).

[239] The difficulty of estimating the costs of the death penalty is due in part to the absence of reliable data, which is, in turn, due in part to the resistance of participants in the death penalty process to data collection. The Commission studied, among other things, the effectiveness of the death penalty in California. Striving to gather the information necessary to estimate the cost of the death penalty in California, the Commission concluded that "it is impossible to ascertain the precise costs of the administration of California's death penalty law at this time." (CCFAJ Report, *supra*, at p. 144.) The Commission recommended a comprehensive system of data collection to allow monitoring and analysis of cost information, administered by the state. The recommendation was ignored. For its Final Report, the Commission used educated but rough estimates of cost based, in part, on studies conducted in other states. (CCFAJ Report, *supra*, at pp. 144-145.)

studies exploring the fiscal impact have reported that an enormous amount of public funds have been spent, and continue to be spent, on capital cases.

At trial, most death penalty cases involve two court-appointed defense attorneys.[240] The inclusion of the separate, crucial penalty-phase portion of the trial necessitates increased investigation and supplemental services of multiple experts. Jury selection, which includes the process of death qualification, requires larger jury pools and significantly more time spent in jury selection. The trials themselves are considerably longer than non-capital murder trials. Clerical and administrative costs, including such additional burdens as the transcriptions of all proceedings,[241] are also increased.

The Commission, in 2008, estimated that the death penalty allegation easily adds $500,000 to the cost of a murder trial, admitting that this was "a very conservative estimate."[242] In 1993, a U.C. Berkeley School of Public Policy researcher estimated the difference to be $1.27 million.[243] Judge Alarcón and Professor Mitchell put the number at roughly 1 million dollars per capital trial.[244]

If the trial results in a death penalty, the increased cost carries forward to the appeal and the state habeas proceedings. Again, precision is difficult, but the California Supreme Court's payments to court-appointed appellate attorneys, coupled with the budget of the California Habeas Corpus Resource Center, runs well over $30 million annually.[245] Significant portions of the resources of the Office of the

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[240] California law favors two counsel in capital trial cases pursuant to Penal Code § 987(d) and *Keenan v. Superior Court* (1982) 31 Cal.3d 424. The American Bar Association views at least two qualified defense attorneys as mandatory. (See ABA Guidelines, *supra*, Guideline 4.1.A.1., 31 Hofstra L.Rev. at p. 952.)

[241] California Penal Code section 190.9 requires transcription of all proceedings in a capital trial case, something not required in other felony cases. The cost of transcript preparation "is significant, especially when the average death penalty trial [reporters'] transcript runs in excess of 9,000 pages." (Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S78.)

[242] CCFAJ Report, *supra*, at p. 145.

[243] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S74.

[244] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S79.

[245] In 2009, the budget for payments to court-appointed counsel in criminal cases by the California Supreme Court (almost all of this total going to capital cases) was, according to the Roadmap study article, $15,406,000. (Roadmap, *supra*, 44 Loyola L.A. L.Rev. at pp. S85-S86.) The Habeas Corpus Resource Center Budget for FY 20-21 is

State Public Defender and the California Attorney General's Office are also devoted to capital appeals and state habeas corpus proceedings. The Commission estimated that "at least 54.4 million [per year] is currently devoted to post-trial review of death cases in California."[246] The Roadmap study estimated the cumulative impact of the cost of automatic appeals and state habeas corpus proceedings at $925 million during the period 1985-2010.[247]

State funding is only part of the equation. Federal law mandates that indigent persons under sentence of death receive court-appointed attorneys for their federal habeas corpus proceedings.[248] Federal habeas cases involve extensive investigation, litigation and, many times, evidentiary hearings. The authors of the Roadmap study were able to learn that, of the 194 California capital federal habeas cases closed prior to 2010, funding for court-appointed counsel, investigation, expert witnesses, and other expenses averaged $ 635,000 per case.[249] Added to these expenditures are the costs of the Capital Habeas Units in the Federal Defender offices for the Eastern and Central Districts, and the administrative costs in both the District Courts and the Ninth Circuit. The Roadmap authors estimated that over $ 775 million in federal funds had been spent on California death penalty cases from the reinstitution of the death penalty in the 1970s through 2010.[250]

The Commission estimated, in 2008, that the total added cost of a death penalty system to the taxpayers was $ 137.7 million per year.[251] Summarizing the situation in 2010, a decade of dollars ago, Judge Alarcón and Professor Mitchell, noting that roughly 4 billion dollars had been spent on the death penalty in California, concluded that capital punishment was "a multibillion-dollar fraud on California taxpayers."[252] The District Attorney of Los Angeles has recently concluded

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$16,846,000. (Cal. Dept. of Finance, 2020-21 State Budget: 0250 Judicial Branch (2020) <http://ebudget.ca.gov/budget/publication/#/e/2020-21/Department/0250> (as of Feb. 12, 2021).

[246] CCFAJ Report, *supra*, at p. 146.

[247] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at pp. S79, S88.

[248] 28 U.S.C. § 3599(a)(2)

[249] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S94

[250] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at pp. S98-S99.

[251] CCFAJ Report, *supra*, at p. 146.

[252] Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S46. One point made quite persuasively in the Roadmap study article is the important observation that the

that the death penalty "makes no fiscal sense from the prospective of public safety" because the enormous sums spent on capital punishment "are better spent on programs that improve the quality of life and safety of the . . . community."[253]

B. Most Death Judgments Do Not Survive Review[254]

The majority of death sentences in the United States are eventually reversed.[255] The stage of the review process in which reversals most often occur varies by state.[256] In California, another feature of our dysfunctional system is that most reversals occur only after a case has reached federal court. This means that California expends enormous resources litigating capital cases, often for decades, with only a minority of those death sentences ultimately withstanding review.

Since Chief Justice Rose Bird and two other justices lost their seats on the California Supreme Court in 1986, after being portrayed as too soft on the death penalty, the Court has affirmed capital cases at one of the highest rates in the country, at nearly 90 percent.[257] As a result, most capital cases in California proceed

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California ballot initiatives concerning the death penalty that the voters approved were characterized by misleading fiscal designations. The Legislative Analyst estimation of the costs of the initiatives was laughably incorrect. Again and again, the information on the ballot initiatives described the additional costs as minor or unknown. Thus, the electorate was not provided "with a clear and honest picture of . . . the cumulative cost of implementing the death penalty in California." Consequently: "California voters who voted in favor of . . . death penalty initiatives were not informed of the cost of enforcing these initiatives." Roadmap, *supra*, 44 Loyola L.A. L.Rev. at p. S160.

[253] Los Angeles County District Attorney, Special Directive 20-11 (Dec. 7, 2020) p. 2 <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-11.pdf> (as of Feb. 22, 2021).

[254] Figures in this section are from HCRC data on file with, and updated by, OSPD.

[255] The most common outcome following a death sentence reviewed between 1973 and 2013 was reversal of the sentence on appeal. (Deadly Justice, *supra*, at p. 139.) In a national study of capital cases decided between 1973 and 1995, James Liebman and his colleagues determined that 68% of death cases were reversed. (See Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995* (2000) 78 Tex. L.Rev. 1839, 1850.)

[256] Deadly Justice, *supra*, at pp. 139-155.

[257] Deadly Justice, *supra*, at p.151 (California has lowest reversal rate of any jurisdiction other than the federal government, among those with more than 40 death

to collateral review (petitions for habeas corpus in state and federal court) where cases must be fully reinvestigated, consuming enormous resources. In turn, the California Supreme Court, and more recently, superior courts, reverse very few cases on habeas review. Thus, most capital cases proceed to federal court where a majority of petitioners are granted relief on the same claims that were denied in state court.

Meaningful review of California capital cases takes an average of 25 years or more, longer than in any other death penalty state,[258] and is very expensive. In the end, 83 percent of all cases that have reached final disposition have been reversed.[259] Of those who were resentenced after obtaining relief, 69 percent were resentenced to life without the possibility of parole or less.[260]

1. The Reversal Rate of Capital Sentences in California

Direct Appeals. Since 1978, 1,077 death judgments have been imposed in California.[261] The California Supreme Court has decided 748 direct appeals.[262] Of those, the court has reversed 126 death judgments or 17 percent at either the guilt phase (39 cases) or the penalty phase (87 cases).

State Habeas Petitions. The California Supreme Court has decided 802 of the 1,001 petitions[263] for a writ of habeas corpus filed by capitally sentenced persons

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sentences between 1973 and 2014); CCFAJ Report, *supra*, at pp. 120-121, n. 21, citing Uelmen, *Review of Death Penalty Judgments By the Supreme Courts of California: A Tale of Two Courts* (1989) 23 Loyola L.A. L.Rev. 237; Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases* (1995) 75 B.U. L.Rev. 759, 761.

[258] Deadly Justice, *supra*, at p.160; see HCRC Report, *supra*, at pp. 11-13; CCFAJ Report, *supra,* at p. 125.

[259] Based on data from HCRC on file with OSPD, 261 cases have progressed to a final disposition in either state or federal court. Of those cases, 217 resulted in grants of relief at either the guilt or penalty phase for a total reversal rate of 83%.

[260] Of the 196 people who were resentenced after obtaining relief, 135 were resentenced to LWOP or less. A number of cases are still pending resentencing.

[261] This number includes people who have had more than one death judgment imposed.

[262] The court dismissed an additional 66 cases either as moot or due to the death of the appellant.

[263] This number includes more than one petition for multiple defendants.

since 1978.[264] The court granted 29 petitions and five more were granted as the result of a stipulation for a non-death sentence for a total reversal rate of 4 percent. Eight petitioners (23.5 percent) were granted guilt phase relief and 26 petitioners were granted penalty phase relief (76.5 percent).

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Collectively, the 160 grants of relief in a total of 1,550 final direct appeals and habeas proceedings equals a reversal rate of just over 10 percent by the California Supreme Court. Put another way, of the 1,077 death judgments imposed in California, 160 (15 percent) to date have been reversed by the California Supreme Court. The low reversal rate in state court means that most California capital cases proceed to federal court, incurring further expense.

Federal Habeas Petitions. In federal court, 118 California capital cases have progressed to final judgment.[265] A federal court granted relief in 70 cases equaling a 59 percent reversal rate.[266] The court granted guilt phase relief in 24 cases and penalty relief in 46 cases.

2. Most defendants who obtain relief are resentenced to life

State Court. Of the 126 direct appeal cases in which the California Supreme Court granted relief, there is resentencing information for 117. Of these, 47 defendants (40 percent) initially sentenced to die were resentenced to death. Seventy defendants (60 percent) were resentenced to a term of life without parole or less. This includes three defendants who were subsequently acquitted, and three more whose cases were dismissed.

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[264] The court dismissed an additional 67 petitions either as moot or due to the death of the petitioner.

[265] This number includes two separate death judgments counted as a single denial of relief for Dean Carter.

[266] This number includes cases of clients who were eventually resentenced to death and have appeals currently pending. The reversal rate has declined since the Commission reported in 2008 that the reversal rate in federal court was 70 percent. (CCFAJ Report, *supra*, at p. 115.) The decrease is likely attributable, *inter alia*, to application of the Antiterrorist and Effective Death Penalty Act of 1996. (See Tabak, *Part VI: Corrections and Sentencing Chapter 17, Capital Punishment* in The State of Criminal Justice, (Am. Bar Assoc. edit., 2020) pp. 257-258.)

Of 34 habeas relief grants,[267] four people were resentenced to death. Of those four new death sentences, one person is awaiting retrial after his conviction was reversed in a second habeas proceeding.[268] Twenty-five other people were resentenced to life without parole or less. Two people were exonerated and never recharged.[269] Thus, of the 31 petitioners for whom resentencing information is available, 27 or 87 percent, were resentenced to life without the possibility of parole or less.

Federal Court. Of the 70 petitioners granted relief in federal court, resentencing information is available for 50: 39 of these or 78 percent were resentenced to life without parole or less, and 11 petitioners or 22 percent were resentenced to death.

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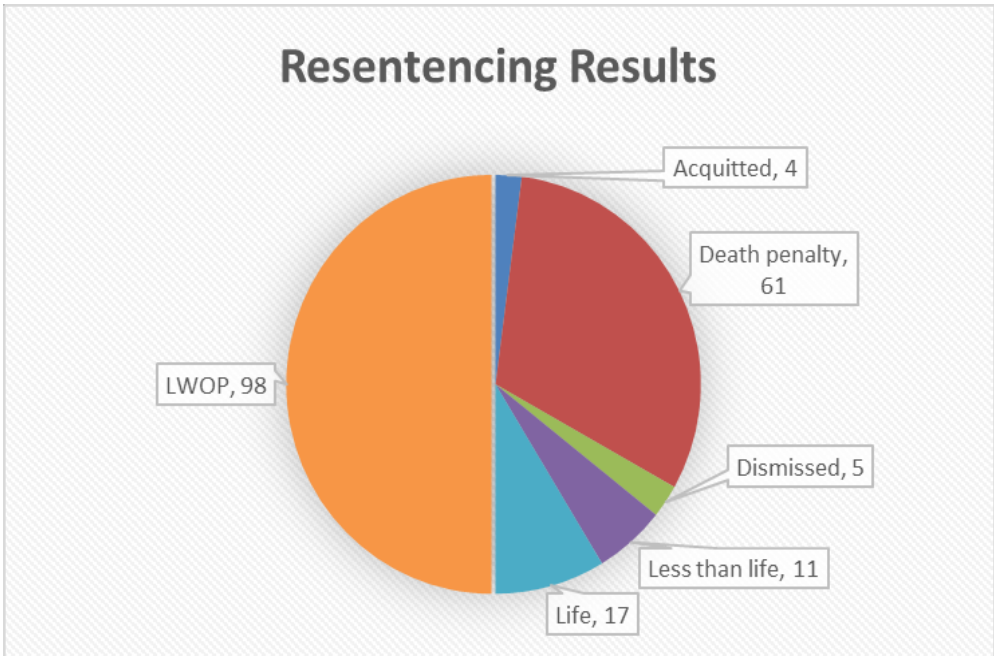
Collectively, of the 196 people who have been resentenced following a grant of relief in state or federal court, 135 or 69 percent were resentenced to life without the possibility of parole or less.



[267] This number includes one petitioner whose two petitions were consolidated and granted. These counted as two grants of relief.

[268] See *In re Gay* (2020) 8 Cal.5th 1059. The state is no longer seeking a death sentence. <https://losangeles.cbslocal.com/2021/01/14/prosecutors-drop-death-penalty-bid-accused-cop-killer-retrial-kenneth-earl-gay/.>

[269] See section IV.E above.

This figure does not mean the system is working. Most of these reversals were obtained only after decades of costly litigation. Many people died before final resolution of their cases.[270] Moreover, as discussed below, due to a severe shortage of counsel, many California cases that suffer from the same flaws are in indefinite limbo.

VII. THE DELAY AND DYSFUNCTION OF CALIFORNIA'S DEATH PENALTY DEPRIVES IT OF ANY LEGITIMATE PENOLOGICAL PURPOSE

The dysfunctional administration of the death penalty in California has created another form of intolerable arbitrariness. As District Judge Carney explained in 2014, "systemic delay has made [each individual death row prisoner's] execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*."[271] These delays are primarily the result of "a human capital problem in the courts: there simply are not enough judges or lawyers" to handle the volume of capital cases generated in California.[272]

Since Judge Carney's analysis in 2014, 47 more people have been sentenced to death in California.[273] That represents a decline in death sentencing that has finally diminished the backlog of cases awaiting the appointment of appellate counsel to

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[270] Among people on California's death row, 149 have died of causes other than execution since 1978, including an estimated 12 people on death row who died of COVID-19 in the last year. < https://www.cdcr.ca.gov/capital-punishment/condemned-inmates-who-have-died-since-1978/> (as of Mar. 16, 2021); Fagone & Cassidy, *California executions on hold, but coronavirus killing San Quentin inmates*, S.F. Chronicle (Aug. 10, 2020) < https://www.sfchronicle.com/crime/article/California-halted-executions-in-2019-Now-15470648.php> (as of Mar. 16, 2021).

[271] *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1053, original italics, revd. *sub nom*. *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538, 543; see also Roadmap, *supra*, 44 Loyola L.A. L.Rev. S41.

[272] Colón, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment* (2009) 97 Cal. L.Rev. 1377, 1393.

[273] HCRC Report, *supra*, at p. 8.

17.[274] But the other delays Judge Carney described are worse than ever and have no prospect of improving.

Proposition 66, passed in 2016, promised to "mend not end" California's death penalty, by speeding up appeals and saving money.[275] It has done neither. In fact, Proposition 66 has further slowed the post-conviction process.

Proposition 66 shifted responsibility for appointment of counsel to superior courts and promised to expand the pool of habeas counsel to eliminate the backlog of cases awaiting counsel.[276] It did not, however, provide any funds to pay counsel appointed under its aegis. Thus far, only three attorneys have been placed on the roster of attorneys eligible for habeas appointments under the new system.[277] Since Proposition 66 was passed, there has not been a single new appointment of habeas corpus counsel.[278]

Moreover, by shifting responsibility for adjudicating habeas cases to the superior court, Proposition 66 created an additional level of review: either party may appeal an adverse ruling to the state court of appeal, where new counsel must be appointed. But there is currently no mechanism to pay these attorneys. Consequently, there are now 19 petitioners awaiting appointment of habeas corpus counsel in the California Courts of Appeal.[279]

At the end of 2020, there were 363 people awaiting appointment of habeas counsel – approximately the same number as in 2016 – including 123 people whose death judgments have already been affirmed on direct appeal.[280]

Justices of the California Supreme Court have repeatedly expressed frustration with the intractable delay and dysfunction in California's death penalty

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[274] *Ibid.*

[275] See Cal. Sec. of State, Elections Division, Voter Information Guide: Argument in Favor of Proposition 66 (Nov. 8, 2016) p. 108 <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> (as of Feb. 22, 2021).

[276] *Ibid.*

[277] HCRC Report, *supra*, at p. 25.

[278] HCRC Report, *supra*, at p. 10 & fn. 3.

[279] *Id.* at pp. 10-11.

[280] *Id.* at p. 9.

system.[281] But the Court has thus far rejected Judge Carney's view that California's death penalty is unconstitutional because, as administered, it serves no legitimate penological purpose: "the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had."[282]

CONCLUSION

In *McGautha v. California* (1971) 402 U.S. 183, 204, the United States Supreme Court expressed great skepticism about the Model Penal Code's death penalty provisions, observing that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." The failure of the modern death penalty has demonstrated the truth of this observation.

The death penalty as administered in California is tainted by racial discrimination and applied arbitrarily based on geography. Far from being reserved for the worst offenders, the death penalty is imposed too often on young offenders, particularly youth of color, on the severely mentally ill and intellectually disabled, and on those who have been raised in the most deprived and abusive circumstances. California taxpayers spend millions imposing and then defending these flawed death judgments – most of which are reversed after decades of litigation.

The death penalty as administered in California serves no penological purpose. It has, indeed, become "nothing more than the purposeless and needless imposition of pain and suffering."[283] Not only are the monetary costs of the death penalty astronomical, but the uncertainty and delay take an enormous emotional toll on

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[281] *People v. Potts* (2019) 6 Cal.5th 1012, 1063-1065 (conc. opn. of Liu, J.) (citing remarks of current and former Chief Justices).

[282] *Jones v. Chappell, supra*, 31 F.Supp.3d at p. 1063; see *People v. Seumanu* (2015) 61 Cal.4th 1293, 1375 (rejecting "*Jones* claim" that delays in implementing the death penalty under California law have rendered that penalty impermissibly arbitrary, on record before the Court).

[283] *Enmund v. Florida* (1982) 458 U.S. 782, 798, quoting *Coker v. Georgia* (1977) 433 U.S. 584, 592.

victims' families. People incarcerated on death row in turn are subjected "to decades of especially severe, dehumanizing conditions of confinement."[284]

There are some things the legislature could do to ameliorate the problems described in this Paper, but they would be band-aids on a gaping wound. Many of the possible remedies – creating an exception for the mentally ill or making the Racial Justice Act retroactive – would require significant resources to implement. Public defender offices already lack the staff and funding to adequately assist clients and former clients with other remedial statutes enacted by the legislature. As discussed above, there is a severe shortage of attorneys to handle current capital post-conviction cases. Well-intentioned changes in the law, without addressing the death penalty itself, could actually exacerbate the shortage of legal resources.

Abolishing the death penalty, in contrast, would allow all the resources currently spent on the death penalty to be redirected to other unmet needs in the criminal justice system and to address the inequities that fuel it.

The time for half measures is past. Abolition is the only solution.

[284] *Glossip v. Gross, supra*, 576 U.S. at p. 925 (dis. opn. of Breyer, J.), quoting *Johnson v. Bredesen* (2009) 558 U.S. 1067, 1069 (Stevens, J., statement respecting denial of certiorari).